TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 343.

WARD AND GOW, PLAINTIFF IN ERROR,

vs.

HIMAN KRINSKY AND STATE INDUSTRIAL COMMISSION.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

FILED JUNE 4, 1921.

(23,296)

(28,298)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 16, 1921.

Court of Appeals of the State of New York.

Before the STATE INDUSTRIAL COMMISSION, Respondent, in the Matter of the Claim of Himan Krinsky for Compensation under the Workmen's Compensation Law, Claimant-Respondent, against Ward & Gow, Employer-Appellant.

RECORD ON APPEAL.

Everett, Clarke & Benedict, Attorneys for Employer-Appellant, No. 37 Wall Street, New York City.

Charles D. Newton, Attorney General, State of New York, Albany, N. Y.; Bernard L. Sheintag, Counsel for State Industrial Commission, 124 East 28th Street, New York City.

New York Supreme Court, Appellate Division, Third Department.

Claim No. 278,227.

STATE INDUSTRIAL COMMISSION, Respondent, in the Matter of the Claim of HIMAN KRINSKY, Employee; WARD & GOW, Employer.

Statement under Rule 41.

This is an appeal from an award of compensation made by the State Industrial Commission on February 16, 1920, for injuries received by the claimant, the award being for the period covering February 27th, 1919, to September 18, 1919, at the rate of $11.54 per week.

The appearances are Everett, Clarke & Benedict, attorneys for employer. Carmody & Carswell, Esqs., are the attorneys for claimant. Hon. Bernard L. Shientag, counsel, and Hon. Charles D. Newton, Attorney General for the State Industrial Commission.

There has been no change of parties or attorneys since the proceeding herein was commenced.

Notice of Appeal.

Supreme Court, Appellate Division, Third Department.

State Industrial Commission.

Claim No. 278,227.

In the Matter of the Claim of HIMAN KRINSKY, Employee; WARD & GOW, Employer.

SIRS:

Please take notice that the Employer, Artemas Ward, doing business under the trade name of Ward & Gow, hereby appeals to the

Appellate Division of the Supreme Court, Third Judicial Department, from the award of the State Industrial Commission, made herein and entered in the office of the said Commission on the 16th day of February, 1920, notice of which was sent out on the 25th day of February, 1920, and from each and every part of said award.

Dated, New York, March 1st, 1920.

Yours, etc.,

EVERETT, CLARKE & BENEDICT,
Attorneys for Employer

37 Wall Street, Borough of Manhattan, City of New York.

3 To:

The Attorney General of the State of New York, Albany, N. Y.
The State Industrial Commission, Albany, N. Y.
Carmody & Carswell, Esqs., Attorneys for Claimant, 2 Rector Street, Manhattan, New York City.
The Clerk of the Appellate Division, Third Department.

Application for Employment.

Ward & Gow, 39-41-43-45 Park Place.

Division —.
Department —.

(To be answered in applicant's own handwriting using ink.)

Caution.

Statements made by you and references given in your application are fully investigated. False statements render you liable to a fine or imprisonment under Section 939 of the Penal Law.

I have read the above caution.

HIMAN KRINSKY.

April 4, 1919.

4 Full name of applicant? Himan Krinsky.
For what position? Salesman.
Present address? 542 W. 45th St.
How long have you lived *their?* 2 years.
Where did you live just before that? 243 W. 43d St.
How long have you lived in New York? 10 years.
Where were you born? Russia.
Town, County, and State: ——.
Age 50 years. Height 5 feet. Married, yes.
What family have you? Wife and 4 children.
Name: ——. Address: ——. Relation: ——.

All applicants must be in good health, sound in every member and in full possession of every faculty. Must also be able to read and write the English language.

Have you ever been employed under any other name? No.

Fill in the following blanks, giving dates of your employment and names of employers during the past five years?

From		To		Employed as	In service of	At address.	Reasons for leaving.
Month.	Year.	Month.	Year.				
Nov.,	1915.	May,	1916.	Salesman.	C. Gas.	Hester & Co., Elizabeth.	
Nov.,	1915.	May,	1916.	Salesman.	C. Gas.	Elizabeth.	Myself.

5 EXHIBIT A.

Give names and addresses of four persons who can testify as to your character.

Name.	Address.	Business.
Standard Smelting & Refining Co.	547 West 27th St.	S. & Refining
N. E. Bergen	232 South St.	Scrap rubber
Cons. Gas. Co.	Hester & Elizabeth.	Gas
Metal Bag Co.	68 New Chambers.	Bags

I do solemnly declare and affirm that all the statements made and answers given hereon by me are absolutely full and true, without any reservation whatsoever and I do agree, as a condition of my employment to obey strictly all the rules and regulations of Ward & Gow now in force, or that may be issued thereafter from time to time, for the government of its employees, and acknowledge the right of said Ward & Gow or its officers to terminate my employment at any time without notice and also agree that my wages shall cease at the time of termination of my employment and shortages in my accounts to be deducted from my salary or from security furnished by me.

In witness whereof, I have signed my name this Apr. 4, 1918.

HYMAN KRINSKY.

Signed in the presence of:
H. FRANKEL.

6 (To be filled in by applicant when he reports to the Appointment Bureau after being notified to do so.)

Did you make the above aplpication for the position of salesman on the 4th day of April, 1918?

Did you sign said application? Yes.

Dated Apr-l 4, 1918.

HIMAN KRINSKY.
Signature of Applicant.

Signed in the presence of H. Frankel.

EXHIBIT B.

Ward & Gow,

News and Vending Department,

Subway and Manhattan L Division,

43 Park Place.

Tel. Barclay 7460.

New York, April 8th, 1918.

Chas. E. Atkinson, Manager.
To Agt. Himan Krinsky:

We have been informed by our Company Doctor, R. J. E. Scott, that you are suffering from Hernia on the right side. We kindly ask you to sign the release below absolving Ward & Gow from any claims if your complaint suddenly becomes acute.

7 I, Himan Krinsky, knowing that I have had a hernia for the past fifteen years, do hereby release Ward & Gow from any claims that may arise now or at any other time while in their employ in the event that my said affliction becomes acute.

(Signed) H. KRINSKY.

Witness by
—— ——.

Notice of Award.

State Industrial Commission,

Bureau of Workman's Compensation.

T. E. D. Inj. 2/27/19. Date 2/25/20.
Claim No. 278,227. N. Y.

To:

Ward & Gow, Employer,
39-43 Park Pl., N. Y.:

and

Himan Krinsky, Employee,
542 W. 45th St., City:

and

No Insurance, Ward & Gow, Insurance Carrier,
39-43 Park Pl., N. Y.:

You are hereby notified that at a meeting of the State Industrial Commission held 2/16/20 a decision and award of compensation was

8 made in the above matter, as follows: $334.66 for 29 weeks' disability at $11.54 per week (this does — include first two weeks for which compensation is payable only in cases in which disability has lasted more than forty-nine days) and the case was continued $— per week for a period of — weeks, beginning —— ——, 191—, and $— was awarded for medical services.

The employer is hereby directed in accordance with the provisions of the Workmen's Compensation Law, to pay the above award to the State Ind. Com. in the following manner:

$334.66 at once for period from 2/27/19 191—, to 9/18/19— 191-, and the balance (if any) periodically, in accordance with the method of payment of wages of the employee at the time of injury, and in addition $— as award for medical services.

The above copy of the decision and award is sent to you pursuant to sections 20 and 23 of the Compensation Law.

STATE INDUSTRIAL COMMISSION.
EDWARD F. BOYLE,
Chairman.

Attest:
WILLIAM S. COFFEY,
Secretary.

By WM. T. PENDLETON,
Chief of Claims.

9 *Employer's First Report of Injury.*

State Industrial Commission,

Bureau of Workman's Compensation.

Case No. 278,227.

Employer's name: Ward & Gow.
Office address: 39-43 Park Place.
Business (goods produced, work done or kind of trade or transportation): Newsstands.
Average number of employees: 1 employee at newsstand.
Location of plant or place of work where accident occurred (if not at office address): Not at our place of work.
Date of accident: Feb. 27 day of, 1919; hour of day 7:30 A. M.
Did accident happen on the premises? No.
Away from the plant of employer? Yes.
If away from the plant state where: Edge of subway station, Mott Avenue.
Full name of injured employee: Herman Krinsky.
Address: 542 W. 45th St.
Sex: Male.
Age: 50.
Single, married, widowed or divorced: Married.
Speak English: Yes.

If not, what language?
Citizen of what country? Russia.
Occupation when injured? News agent.
If injured continued to work after his accident, state for how long? 4 hours.
Was injured employee doing his regular work? No.
10 If not, state regular occupation: Pouring drinking water on R. R. tracks over edge of platform.
How long was injured person in your employment? 10 mos.
Piece or time worker? Time.
Wages or average earnings per day, including overtime: $2.83⅓.
Working hours per day? 11.
Days per week? 6.
Describe in full how the accident occurred: Was not injured at his location or in performance of his work. Know nothing of alleged injury except Doctor's Report.
Name of machine, tool or appliance involved, if any ——
Part on which accident occurred? ——.
State part of person injured and nature of injury? Injured in head according Dr. Gersh of Lincoln Hospital.
Did injury cause loss of any member or part of member? ——. If so, describe exactly ——.
Did injury result in serious head or facial disfigurement? Don't know.
If so describe exactly ——.
Was medical attendance provided by you? No.
How soon after accident? ——.
Name and address of physician. ——.
To what hospital was employee sent? Went home.
If not sent to hospital, where is he? Don't know.
Are you still providing medical attendance? No.
Has employee returned to work? No.
11 Date and hour of return —— ——, 19—. — A. M./ P. M.
If so, is he fully recovered and earning full wages? ——.
If not returned to work, probable length of disability (give your best estimate). ——.
Important.—In what company is Compensation Insurance Carried? (must be answered); None. Position not within law of compensation.
Signed at 39 Park Row, N. Y., this 8th day of Sept., 1919.
Firm name: Ward & Gow.

(Signed) J. N. CALLAGHAN,
Supt.

Official Title: Newsstand Dept.

(Marked in lead pencil, "File.")

The State Industrial Commission,
230 Fifth Ave.,
New York, N. Y.

DEAR SIRS:

Replying to claim 278,227 N.Y., case of Himan Krinsky, we herewith enclose form C.N.Y.-2, duly filled out.

While we are complying with your request relative to the filling out of this blank, we do not see where the case of Himan Krinsky has anything to do with us as his employment was in the nature of Salesman at one of our Stands, located at Mott Ave., down
12 Subway, and is, therefore, not in our estimation a claim that comes within the Laws of Compensation.

Yours very truly,

WARD & GOW,
By J. N. CALLAGHAN,
Supt. of News Stands.

39 Park Place.

J. N. CALLAGHAN.
M. D. B.

Attending Physician's Report.

State Industrial Commission,

Bureau of Workman's Compensation.

Principle Office: The Capitol, Albany, N. Y.

(All questions in this blank should be answered and the report should contain an account of all injuries, no matter how trivial. Fill out blank in ink, using pen or typewriter, and mail promptly to the Commission at its New York City Office.)

1. Name of injured person: Hyman Kerinsky. Address: 542 W. 45th St.

2. Name of employer: —— ——. Address: No.

3. Date of accident: Feb. 27, 1919, at 7.30 A. M. Was first treatment rendered by you? Yes. When? —— — ——.

4. If not, by whom? Hospital Ambulance, Address: Harlem Hospital.

5. If an assistant consultant or anæsthetist was necessary give name and address. No.

13 6. Did employer authorize medical services? No.

7. Was injured person removed to hospital? No. Name of hospital ——. Address ——.

8. Give an accurate description of the nature and extent of the injury: Fracture of skull left temporal region. Laceration of right brow.

9. Describe the treatment. Suture of laceration—rest in bed, ice bag, etc.

10. Are the symptoms from which he is suffering due entirely to this injury? Yes.

11. Is he able to attend to any part of present or any other occupation? No.

12. Has the injury resulted in any permanent disability or disfigurement of head or face? If so, what? Fracture of skull, with ex *ndole* causing pressure on mator area, weakness in right hand and arm.

13. Has previous sickness, injury or disease contributed to his disability? No. If so to what extent?

14. For what period (form the date of accident, not form date of this report) is disability likely to exist? A. From the surgical viewpoint 3 weeks. B. From the vocational viewpoint? probably permanent impairment.

15. State in patient's own words how accident occurred. While standing on the subway station platform a train struck him on left side of head, throwing him to the ground.

J. J. KENNY,
Attending Physician.

Dated at 120 W. 70, Aug. 11, 1919.

14 *Employee's Claim for Compensation.*

State Industrial Commission,

Bureau of Workmen's Compensation.

Claim No. 278,227.

Having first presented a claim to my employer and not having within ten days thereafter reached an agreement with him for payment of compensation, I hereby present my claim to the State Industrial Commission for compensation for disability resulting from an accident arising out of and in the course of my employment and not occasioned by my wilful intention or solely through intoxication, and in support of it I make the following statement of facts:

Name of injured person: Himan Krinsky.
Address: 542 West 45th St.
Sex: Male.
Age: 51 years.
Nationality: Hebrew.
Speak English? Yes.

Married? Yes.
Date of Accident: Feb. 27, 1919.
Hour of Day: 7.30 A. M.
On what date were you compelled to stop work as result of this injury? Feb. 27, 1919.
Exact location of place where accident happened? Downtown subway platform of the Mott Avenue Station in the Bronx.
Was it at the plant or away from it? At the plant.
State occupation when injured: Attending advertising and supply stand.
How long have you worked at this occupation? About six months.
How long have you worked for present employer? About six months.
Were you doing your regular work when injured? Yes.
Piece or time worker? Time. Wages per full day? $18.00 per week.
How did accident happen? I was emptying into subway track a bottle of water always kept by me back of the stand for drinking and to keep my hands clean for my work in handling candy, etc., when I was struck by subway train on side of head.
State fully nature of injury: Fracture of the skull with constant pain in the head and much impaired use of right arm and right side.
Name of employer: Ward & Gow.
Office address: 39-43 Park Place, Manhattan, New York City.
Nature of business: Advertising and selling candy, gum, magazines, etc.
Have you returned to work? No.
If so, when? ——.
If not, when you — be able to return? Probably never.
Have you received any wages (this does not mean compensation) since the date of your accident? No.
If you have been paid your wages, to what date? Feb. 27, 1919.
Will you be able to take up regular employment when you return to work? No.
If not, why not? My head pains me and my right hand does not take a firm grip on anything.
Have you given your employer notice of injury? Yes.
When? About 2/27 and about 3/13.
How? An employee of W. & G. and my own son.
Name of attending physician: J. J. Kenny.
Address: 120 W. 70th St.
If taken to hospital, give name and address of hospital and date.
——.
Did you request your employer to provide medical attendance? Yes.
Has he done so? No.
Signed this 18th day of August, 1919, at New York City, N. Y.

HIMAN KRINSKY.

542 W. 45th St., N. Y. C.

2—343

STATE OF NEW YORK,
County of New York, ss:

On this 18th day of August, 1919, personally appeared before the undersigned, a N. P. in and for the said County and State, the above named Himan Krinsky, to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed his name thereto in my presence, and made oath that the foregoing statements, and each and all of them are full and true, and are made without reservation or concealment.

ANNA STRASSER,
Notary Public.

Post Office Address, 1454 St. Nicholas Ave., New York City.

17 *Minutes of Hearing.*

State Industrial Commission,

230 Fifth Avenue, New York City,

September 22, 1919.

Case No. 287,227.

HIMAN KRINSKY, Claimant; WARD & GOW, Employers.

No Insurance.

Hearing Before Deputy Commissioner Curtis.

September 22, 1919.

Eva R. Beber, Hearing Stenographer.

Appearances:

Himan Krinsky, Claimant.
Francis X. Carmody, of 61 Broadway, New York City, attorney for claimant.
H. S. Hertwig, of 37 Wall Street, New York City, attorney for Ward & Gow.
Witness: Mr. Harry Frankel, of 841 Whitlock Avenue, New York City, representing employer.

Statements of Mr. Carmody and Mr. Hertwig, attorneys, not included in transcript of minutes, as Commissioner Curtis has
18 requested that they submit briefs.

Mr. Hertwig stated that the employer claimed that there was no jurisdiction because the act did not apply to the case and, if held to apply, would be void because violative of Article I, Section

6 of the State constitution and Article 14 of the amendments to the Federal constitution.

Mr. HIRAM KRINSKY, being duly sworn, testified as follows:

Deputy Commissioner Curtis: Tell us how the accident happened.

Claimant: My duty was to report there 7 o'clock in the morning, and stay until 6 o'clock in the evening, continuously. From the moment I opened, until the moment I closed, I was responsible for every item that was there in that booth, delivered to me.

Deputy Commissioner Curtis: That's understood. Tell us how the accident happened.

Claimant: In the morning I cleaned around the place, and supplied my goods, cleaned up the counter and the candies and my hand was dirty, I washed my hands so as to be able to sell the candies and papers to the people. The water was dirty and I emptied it from the bottle on the track, so in case I get a chance to send somebody upstairs to get me some more water. While I was leaning pouring out the water, the train struck me on my left side and knocked me on the right side, and two guardsmen took me off. I stood there is a dazed condition for a few minutes, then I came to myself. I went to the counter, blood was running and one
19 of the inspectors came along and I told him I don't think I will be able to stand at the stand, that I am hurt, and am in a terrible condition. He says wait, I says I don't think I can. I tried to stay, then came along Mr. Franklin, and he took me home, brought me to my home.

Deputy Commissioner Curtis: That's how the accident happened. You were emptying this water and the train struck you.

By Deputy Commissioner Curtis:

Q. Did you keep that water there every day?
A. Yes.
Q. And it was necessary for you to keep the bottle of water under your counter?
A. Positively. Because there was so much dust, and I was given orders strictly to keep the place as neat as possible. And if one of their inspectors came along and found any little dust, he would say, what's the matter? What are you doing, sleeping? If you don't do better we will discharge you. Of course, I was obliged to do it.
Q. You emptied that bottle out every morning?
A. Yes.
Q. And in the same place?
A. Yes, and sometimes in the afternoon, too.

Deputy Commissioner Curtis: That's all.

By Mr. Hertwig:

Q. Mr. Krinsky, there was a wash-room?
A. No.
Q. Didn't you ever go to the wash-room?

A. No. Two flights up you have to take the elevator.
20 And you cannot do it, because your stand is open.
Q. Where did you get the water?
A. From upstairs. I would get somebody to bring it.
Q. Didn't you go upstairs occasionally during the day?
A. Not unless I was compelled to do it. Then I closed the place.
Q. Yes. You did go up then, didn't you, when you were compelled to?
A. When I was compelled. There was no way of getting out of it. But this way there was no necessity. It would take thirty minutes, and if they would come along, they would discharge me.
Q. Didn't they ever come along when you were upstairs before?
A. I don't know.
Q. They knew you had to go up from time to time?
A. I don't know.
Q. You did go up there daily?
A. I could not help it. I had to use the toilet.
Q. Nobody ever told you to pour that water on the track?
A. What could I do?
Q. You could take it upstairs.
A. Such a little thing as water. What could I do with it? Take a chance of them finding the stand closed.
Q. Had you not ever taken it upstairs?
A. No.
Q. You wouldn't say you hadn't?
A. Unless I was compelled to go upstairs for other purposes.
Q. There was a place upstairs where you did go when you were compelled to?
A. On the second floor. Took the elevator.

Deputy Commissioner Curtis: That's all.

Mr. Hertwig (to claimant): The water was used to keep yourself clean in handling the candy. Is this the gentleman,
21 Mr. Frankel, who came to you and went to your home?
Claimant: Yes.

Mr. HARRY FRANKEL, of 841 Whitlock Avenue, New York City, being duly sworn, testified as follows:

By Mr. Hertwig:

Q. What is your position with Ward & Gow?
A. Assistant Superintendent, newsstands.
Q. Did you employ Mr. Krinsky?
A. I did, sir.
Q. In what position did you employ him?
A. As salesman at the newsstand.
Q. When did you employ him?
A. I will have to consult my records on that. April 4, 1918.
Q. And did he file an application blank with you?
A. He did, sir.

Q. Is this the application? (showing application).
A. Yes, sir.
Q. Is that his signature?
A. It is.

Mr. Hertwig: I would like to have that marked as evidence. (Paper attached to minutes in folder.) Marked Exhibit A.

By Mr. Hertwig:

Q. Where was he located at the time of this accident?
A. Mott Avenue, downtown side.
Q. Was he in a booth?
A. Yes.
Q. What sort of a booth was it?
A. Steel booth, 12 feet x 8 feet x 2½ feet wide.
22 Q. And how far back from the edge of the subway platform is that booth?
A. About ten feet.
Q. What were his duties in the booth?
A. Selling, keeping the stand in order.
Q. What did he sell?
A. Newspapers, magazines and candies.
Q. And his duties were simply to sell those and report the sales and turn in the collection?
A. Yes, weekly.
Q. How was the stock delivered to that stand?
A. Delivered by our operators right to the stand.
Q. He himself didn't have to bring the stock?
A. No.
Q. Or carry it away?
A. No.
Q. What were his hours?
A. 8 o'clock in the morning until 7 o'clock at night.
Q. And his only duties were simply to go there and stay there during the day, and leave at night?
A. Yes.
Q. Was there any wash room in the vicinity of that stand for him to use?
A. Two flights up.
Q. And he was allowed to use that, was he?
A. Yes.
Q. When he needed to?
A. Yes.
Q. And he could get water there?
A. Yes.
Q. And did you supply him with any utensil to get water for his stand?
A. A pail.
Q. Had you ever told him to empty water into the subway tracks?
A. No.
Q. Had you spoken to him about that at all?

A. No.
Q. When he went there, did you show him where to get the water?
A. I didn't. The inspector may have.
23 Q. Who was the inspector?
A. At that time, Mr. Pollock.
Q. Was Mr. Krinsky in good physical condition when he came to you?
A. No, sir.
Q. I will show you a paper (showing paper). Is that his signature to the paper?
A. Yes.

Mr. Hertwig: I don't know whether this will have any bearing on his present claim of injury.
Deputy Commissioner Curtis: That wouldn't have any bearing on this case.

(Paper marked Exhibit B, attached to minutes in folder.)

By Mr. Carmody (attorney for claimant):

Q. What hours did you say his hours were?
A. Eight in the morning until seven at night.
Q. Did you deliver the pail to that place?
A. No, I don't deliver them.
Q. When you said it was delivered there, what did you mean?
A. Every booth is supplied with a pail.
Q. Would you say it was this pail?
A. I don't know positively.
Q. You never delivered any pail to his booth?
A. Personally, no.
Q. The candies had to be kept clean?
A. Yes.
Q. And he had to be kept clean in handling?
A. Yes.
Q. Your company did insist on that?
A. We expect that from him. I don't know whether he was ever told that or not.

24 By Mr. Hertwig:

Q. Ward & Gow furnish the pails to each booth, don't they?
A. Yes.

By Deputy Commissioner Curtis:

Q. What would be the answer if he went to empty this pail and he wasn't there?
A. No consequence at all. Why he could close up his office if he was compelled to.
Q. What would happen if the water became in such a condition that he had to empty it?

A. He could close the stand. The stands where they have lavatories away from the stand, they are allowed to leave.

By Mr. Hertwig:

Q. What's the pail for?
A. To keep the pail there to wash the stand.
Q. Your purpose is to make it unnecessary for him to leave the stand too often?
A. We instruct the agent when we hire him to get a clean pail of water in the morning and empty it at night when he goes home.

Deputy Commissioner Curtis: I reserve decision. Would you like to submit a brief on it?
Mr. Hertwig: Yes, I would.

By Deputy Commissioner Curtis (to claimant):

Q. What was the water in?
A. I had a bottle. I seen nothing is there and they insist on me to have water and keep clean the stand, so I brought a bottle and wash it and keep it clean.

By Mr. Hertwig:

Q. Was it a milk bottle?
A. Some kind of a bottle.

Deputy Commissioner Curtis: We will reserve decision. You can submit your brief.

By Mr. Carmody (to Mr. Frankel, witness):

Q. What is the business in which your company is engaged?
A. Selling newspapers, candies, etc.
Q. Don't you do advertising?
A. I don't know anything about it. I am not connected with that department.
Q. Isn't it a fact that you advertise and sell only the goods which you advertise?
A. No.

By Deputy Commissioner Curtis:

Q. Of course you don't know whether they do?
A. I do know that.
Q. That they don't do advertising?
A. No. This gentleman asked me that we don't sell any goods but what we advertise.

By Mr. Carmody:

Q. Isn't that a part of your company's business?
A. I wouldn't say yes.
Q. But you wouldn't say no.

Decision reserved.

Eva R. Beber, Hearing Stenographer.

26 October 14, 1919.

I hereby certify that the foregoing is a true and correct transcript of the testimony taken at the hearing before the State Industrial Commission in the case of Himan Krinsky v. Ward & Gow, on Sept. 22, 1919.

EVA R. BEBER,
Stenographer. State Ind. Comm.

State Industrial Commission.

Case No. 287,227.

HIMAN KRINSKY, Claimant,

vs.

WARD & GOW, Employer.

No Insurance.

Minutes of Hearing Held at 230 Fifth Avenue, New York City, Held on Monday, December 8, 1919, Before Deputy Commissioner Thomas J. Curtis.

E. J. Malone, Hearing Steno.

Decision. Claimant present. Employer represented by self. F. E. O. Beattis represented F. X. Carmody, attorney for claimant, and requested then an adjournment of one week be had without notice to show the business the employer was engaged in. Adjourned one week without notice.

27 *Minutes of Hearing.*

Dec. 15, 1919.

State Industrial Commission,

230 Fifth Avenue,

New York, N. Y.

Case No. 278,227.

HIMAN KRINSKY, Claimant; WARD & GOW, Employer.

No insurance.

Minutes of Hearing at 230 Fifth Avenue, New York City, Monday, December 15th, 1919.

Before Deputy Commissioner Curtis.

Appearances:

Himan Krinsky, Claimant.
Mr. F. O. Beattie, for the Claimant.
Mr. H. S. Hertwig, for the employer.

Witness: Mr. William B. Nesbitt, 50 Union Square, New York, N. Y.

Mr. Hertwig: This is a hearing we asked you to open so that we could put in some testimony about the general nature of the business of the employer.

28 Mr. WILLIAM B. NESBITT, of 50 Union Square, New York, N. Y., after being duly sworn, testified as follows:

By Mr. Hertwig:

Q. Are you employed by Ward and Gow?
A. Yes, sir.
Q. What is your position?
A. Business manager.
Q. How long have you been with Ward & Gow?
A. 12 years.
Q. Will you tell us what the general nature and character of business of Ward & Gow is?
A. It is the leasing from the Interborough Rapid Transit Company of the space for advertising of merchandise in the cars of the Interborough subway and elevated and the releasing of the advertising space to the various business houses and the sale of confectionary and periodicals.

Q. You lease these to various persons who want to advertise by cards on the platforms?

A. Yes, card space to concerns like the National Biscuit Company.

Q. And you sell gum and candies through the slot machines and periodicals and newspapers on the booths in the platforms, do you?

A. Yes.

Q. How many people are employed by Ward & Gow? A. 366.

Q. Will you tell us how these employees are divided?

A. It is largely clerical and salesmen, executives, inspectors and artists.

Q. Can you tell us just how these 366 are divided in regard to their functions?

—. To begin with, the business has two divisions. One is the Advertising Division, which consists of the executive
29 office, the advertising soliciting department and the art department. That is at 50 Union Square, and the other division is the Merchandising Division. That has control of the newsstands and periodicals, slot machines, placing of cards and posters. At 50 Union Square. That is the advertising office. The employees there are advertising solicitors.

Q. How many advertising solicitors?

A. Ten.

Q. Yes?

A. And about 20 artists.

Q. What do the artists do?

A. They make designs for cards and posters for clients.

Q. Yes?

A. About five bookkeepers, probably ten stenographers, office boys, etc.

Q. How many altogether at 50 Union Square?

A. About 60.

Q. Have you the exact number?

A. 59. Of course it changes from time to time. (Witness refers to paper.) There are 59 at 50 Union Square and 307 at 39 Park Place.

Q. You have given us the division at 50 Union Square. Can you give us the divisions in regard to function at 39 Park Place?

A. Yes, I have them here on the list. I'll read them if you want me to.

Q. Yes?

A. There are six executives. Thirty-two office workers.

Q. What are those office workers?

A. Clerks, stenographers, penny counters—they are quite a force, probably seven or eight girls who count the pennies from the slot machines and also the small change taken from the newsstands. And stenographers, bookkeepers, office boys, messengers, etc.

Q. Who else?

A. There are 125 newsstand salesmen.

30 Q. And these salesmen are each of them stationed at a separate stand somewhere on the subway or elevated?

A. Yes.

Q. And what are their functions?

A. The duties of a news stand salesman are to wait on the stand, ll periodicals, chewing gum and other confectionary.
Q. Keep an account of the sale?
A. Yes.
Q. And turn in the money?
A. Yes.
Q. Whom else have you at 30 Park Place?
A. News stand inspectors, 14, they go from stand to stand, inspect ie display and see that the stands are properly kept and see that ie public is properly served.
Q. What else?
A. Nine chauffeurs. They drive the trucks with stationery or mer- iandise to the various stations.
Q. And they are insured?
A. Yes.
Q. Who else have you there?
A. 18 porters.
Q. What do they do?
A. They are largely located at 39 Park Place where they unload ucks, trucking supplies for the news stands and load the trucks iat take out the supplies to various routes.
Q. And what else?
A. Three watchmen.
Q. Whom else?
A. Thirty-four slot machine collectors and repair men.
Q. What do they do?
A. They go from machine to machine throughout the subway and evated and collect the pennies and feed the machines with goods id do any light repairing that the machines require.
Q. They work singly, do they?
A. Yes.
Q. What else?
A. There are four weighing machine gatherers. They do the same for the weighing machines that the slot machine collectors do for the slot machines—that is, they collect the pennies.
Q. What else?
A. Six carpenters. They make frames for posters for the elevated ations and repair slot machine boxes and wood cases.
Q. What else?
A. Seventeen bill posters. They go from station to station post- g the posters on the bill boards.
Q. And they work singly, do they, or in pairs?
A. Singly almost entirely because the posters are almost all small osters.
Q. Can they work in pairs?
A. I presume so. Yes, when they have very large posters.
Q. What else?
A. There are 28 men who place cards in the cars. They work hen the cars are not active. That is, they work when the traffic is ghtest and they change the placards, taking out those cards where ie contract has expired or where it is desired to change the card,

and see that the cards are kept in proper condition, replace torn cards with new ones, etc.

Q. And these work singly?

A. Yes, sir.

Q. What else?

A. Five foremen and superintendents. They supervise the card placers and bill posters and carpenters and the other workmen mentioned.

Q. What else?

A. And six machine shop men who repair slot machines that are so damaged that they have to be brought back to the shop.

Q. These are insured?

A. Yes.

Q. That makes a total of 307 in Park Place?

A. Yes.

Q. How long have Ward & Gow been in this business?

A. About 20 years.

Q. How many accidents have you had?

A. I have made inquiries and there is a recollection of four accidents.

32 Q. What were those?

A. One man was killed on the elevated. He was a porter, I think.

Q. How long ago was that?

A. I think that is about eight or nine months ago. One man had his fingers injured wheeling a small hand truck with pennies in it to the sub-treasury and one man injured his fingers in the machine shop.

Q. How long ago were those last two accidents?

A. Probably within three years. I haven't the exact date.

Q. Do Ward & Gow manufacture any of the goods that they sell?

A. No.

Q. They buy it all, do they?

A. Yes.

Q. The chief business is soliciting advertising and displaying these cards and selling these goods and periodicals in the stands and slot machines?

A. The two divisions of the business are about equally important, although one engages more people than the other, the sale of advertising place and the sale of merchandise. They about balance each other in importance of the business.

By Mr. Beattie:

Q. Is Ward & Gow a corporation or a partnership?

A. It is an individual. Mr. Artemas Ward.

Q. He is the sole owner of the business?

A. Yes.

Q. And you have 125 stands to which these magazines and this candy is delivered by nine chauffeurs?

A. Yes.

Q. And the chauffeurs are the only persons outside of the salesmen who go into the stands beside the inspector?

A. I don't know that they go inside the stand. The goods are probably delivered over the counters.

33 Q. Your chauffeurs, you say, are insured?

A. Yes.

Q. Can you tell me the terms of the contract you have with the Interborough, dated December 27th, 1913?

A. I know it is several hundred pages, I think.

Q. Is there any contract indemnifying the injured from any accident?

A. Yes, there is a very large bond. That is, Mr. Ward deposits securities I think aggregating about one hundred thousand dollars for the carrying out of the contract.

Q. That is covering the terms generally?

A. Yes.

Q. With whom was that deposited? With the Interborough Rapid Transit Company, with the Treasurer of the Interborough?

A. Yes.

Commissioner Curtis: I don't think that there is any question but that the employees working for this company is covered because there are four or more of them engaged in a hazardous industry. (Addressing the witness): What is the name of the man who was killed this year? Do you know his name?

Witness: No, I don't.

Commissioner Curtis: We'll have to get that from you. That man's widow ought to be getting compensation.

Mr. Hertwig: I have a memorandum I want to submit on this. The claimant's attorney would like to answer me, if the Commissioner please, and I would like a day or two to reply if there is anything I might want to reply to.

Commissioner Curtis: I don't think there is any question
34 here but what it is covered.

Mr. Hertwig: I think there is. That group 45 applies only to those particular men that are engaged in the occupation—it applies to only operatives and workmen.

Commissioner Curtis: The intent and purpose of the legislation is to this effect: That where there are four or more workmen engaged in a hazardous employment, every other employee within the employ comes under the law.

Mr. Hertwig: I don't think so.

Commissioner Curtis: That is what the legislators had in mind and that is what the Commission had in mind.

Mr. Hertwig: I think if you will consider these cases you will come to a different conclusion on that. I think the intent of it was to simply bring within the law only the workmen and operatives who were working in a group of four or more.

Commissioner Curtis: They were all in it.

Mr. Hertwig: No, before that time it covered only the people who were engaged in a particularly hazardous employment and that was

intended to broaden it to bring in everybody who worked in a group of four or more. The Supreme Court has upheld the constitutionality of that simply on the ground that in group action there is more risk than in individual action. The Attorney General has handed down an opinion in which he says it applies only to persons
35 employed in manual labor. It doesn't cover persons not——

Commissioner Curtis (interrupting): You put in your brief. The Commission has decided to make an award, though. But you can bring in your brief.

Mr. Beattie: Will you let us have an adjournment?

Commissioner Curtis: Yes. Decision reserved.

M. J. WEINTRAUB,
Hearing Stenographer.
J. J. KEENAN,
Clerk.

Findings, Award, and Decision.

State Industrial Commission.

Case No. 278,227.

In the Matter of the Claim for Compensation under the Workmen's Compensation Law Made by HIMAN KRINSKY, WARD & GOW, Employer.

This claim came on for hearing before the State Industrial Commission at its office, 230 Fifth Avenue, New York City, on
36 September 22, 1919, December 8, 1919, and December 15, 1919.

Appearances:

Bernard L. Shientag, Esq., Counsel to the State Industrial Commission.
Everett, Clarke & Benedict, Esqs., Attorneys for Employer.
Mr. F. O. Beattie, for Claimant.

All the evidence submitted before this Commission having been heard and duly considered, the Commission makes its Conclusions of Fact, Ruling of Law, Award and Decision, as follows:

Conclusions of Fact.

1. On February 27, 1919, the day on which Himan Krinsky sustained the injuries herein referred to, he resided at 542 West 45th Street, New York City, and was employed as a salesman by Ward & Gow, with offices and principal place of business at 39-43 Park Place, New York City; said employer being engaged in the business of leasing from the Interborough Rapid Transit space for the advertising

of merchandise on the subway and elevated system operated and maintained by the Interborough Rapid Transit Co. of New York City, and the leasing of advertising from business houses, and the sale of confectionery, newspapers and periodicals on stands situated and maintained and operated by the said employer on the
37 elevated and subway stations of the Interborough Rapid Transit Co. in New York City.

2. Ward & Gow, the employer herein, was engaged in a business in which there were employed four or more workmen or operatives, within the meaning of the Workmen's Compensation Law.

3. Himan Kinsky was employed by Ward & Gow to attend a newspaper and candy stand, owned and operated by Ward & Gow on the downtown platform of the subway system of New York City located at Mott Avenue at the Mott Avenue Station, New York City. In such occupation he was in the habit of keeping behind the news stand a pail of water, which he used in washing his hands and keeping them clean for the sale of candies at the stand, the said pail being furnished by the employer to most of the stands for this purpose. Himan Krinsky was in the habit of emptying out the water in the morning from the pail on to the tracks of the subway, and replenishing his supply of water for the day before starting business.

On February 27, 1919, about 7:30 A. M., while the claimant was engaged in the regular course of his employment, and while emptying a pail of water on to the subway tracks, in order to replenish his supply for the day for the purpose hereinbefore referred to, he was struck on the side of his head by a subway train approaching the station, thereby sustaining a fracture of the skull left temporal region, together with lacerations of the right brow, which in-
38 juries disabled him from February 27, 1919, to September 18, 1919, on which date he was still disabled.

4. The average weekly wage of Himan Krinsky was the sum of $17.31.

5. The injuries sustained by Himan Krinsky were accidental injuries and arose out of and in the course of his employment.

6. It does not appear whether written notice of injury was given to the employer within the time prescribed by Section 18 of the Compensation Law, but the employer was not prejudiced by the lack of such notice, if any.

Ruling of Law.

This claim comes within the provisions of Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as re-enacted and amended by Chapter 41 of the Laws of 1914, and amended by Chapter 316 of the Laws of 1914, and as further amended by the Laws of 1915, 1916, 1117 and 1918, known as the Workmen's Compensation Law.

Award.

Award of compensation is hereby made against Ward & Gow, employer, to Himan Krinsky, injured employee, for the period covering February 27, 1919, to September 18, 1919, at the rate of $11.54 per week, and this claim is hereby continued for further hearing.

39 Decision.

The failure, if any, to give written notice of injury to the employer within the time prescribed by Section 18 of the Compensation Law is hereby excused on the ground that the employer was not prejudiced by the lack of such notice, if any.

Dated, December 15, 1919.

STATE INDUSTRIAL COMMISSION.
EDWARD F. BOYLE,
Chairman;
FRANCES PERKINS,
HENRY D. SAYER,
Commissioners.

Certificate of Secretary.

I, Edward W. Buckley, Secretary of the State Industrial Commission, do hereby certify that I have compared the foregoing papers (except the Statement Under Rule 41) with the respective originals thereof on file in the office of the State Industrial Commission, and that the same are true and correct copies of said originals, and of the whole thereof, and that they constitute all of the papers and proceedings herein, including the evidence, which were before said State Industrial Commission in relation to the foregoing claim.

In witness whereof, I have hereunto set my hand and the official seal of the State Industrial Commission on the 30th day of June, 1920.

EDWARD W. BUCKLEY,
Secretary State Industrial Commission.

40 *Order Settling Case.*

It is hereby ordered that the foregoing printed record is hereby settled as and for the record before the Appellate Division of the Supreme Court, Third Department, upon the appeal herein and the same is hereby ordered on file in the office of the Clerk of the Appellate Division of the Supreme Court, Third Department.

Dated, New York, June 30, 1920.

EDWARD F. BOYLE,
Chairman State Industrial Commission.

41 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court in and for the Third Department Held at the Court House, in the City of Albany, N. Y., Commencing on the 9th Day of November, 1920.

Present:

Hon. John M. Kellogg, Presiding Justice.
Hon. John Woodward,
Hon. A. V. S. Cochrane,
Hon. Henry T. Kellogg,
Hon. Michael H. Kiley,
Associate Justices.

In the Matter of the Claim of HIMAN KRINSKY for Compensation under the Workmen's Compensation Law against WARD & GOW, Appellant.

The above-named Ward & Gow having appealed from the award of the State Industrial Commission entered in the office of said Commission on the 15th day of December, 1919, whereby compensation was awarded to the above-named Himan Krinsky, injured employee, for the period covering February 27, 1919, to September 18,
42 1919, at the rate of $11.54 per week, and the claim continued for further hearing; and said appeal having come on to be heard in this court, and having been argued by Herman S. Hertwig, Esq., of counsel for the appellant, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and due deliberation having been had thereon;

Now, on motion of Charles D. Newton, Attorney General, attorney for the State Industrial Commission, it is

Ordered that the award of the State Industrial Commission appealed from be and the same is hereby unanimously affirmed.

[L. S.] JOSEPH H. HOLLANDS,
Clerk.

43 *Order of Commissioner Making Order of Appellate Division the Order of the State Industrial Commission.*

State Industrial Commission.

In the Matter of the Claim of HIMAN KRINSKY for Compensation under the Workmen's Compensation Law against WARD & GOW, Employer-Appellant.

The above-named Ward & Gow, employer, and insurance carrier, having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department, from the award and decision of the State Industrial Commission, made and entered herein on the

15th day of December, 1919, whereby compensation was awarded the above-named Himan Krinsky, injured employee, for the period covering February 27, 1919, to September 18, 1919, at the rate of $11.54 per week, and the claim continued for further hearing; and said appeal having been duly heard by said Court, and the Appellate Division of the Supreme Court having at a term thereof commencing on the 9th day of November, 1920, unanimously affirmed the award and decision heretofore made by the State Industrial Commis-
44 sion, and the papers on appeal herein, together with a certified copy of the said order of the Appellate Division having been duly filed; it is

Ordered, that the order of the Appellate Division be and the same hereby is made the order of the State Industrial Commission, and the award heretofore made herein be and the same hereby is unanimously affirmed with interest from December 15, 1919.

Dated, New York, December 21, 1920.

E. W. BUCKLEY,
Secretary.

45 *Order Granting Leave to Appeal to the Court of Appeals.*

At a Term of the Appellate Division of the Supreme Court Held in and for the Third Judicial Department, at the Court House, in the City of Albany, New York, on the 4th day of January, 1921.

Present:

Hon. John M. Kellogg, Presiding Justice.
" John Woodward,
" Henry T. Kellogg,
" Michael H. Kiley,
Associate Justices.

In the Matter of the Claim of HIMAN KRINSKY for Compensation under the Workmen's Compensation Law, Claimant, against WARD & GOW, Employer-Appellant.

The above-named employer-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court made herein at a term commencing on the 9th day of November, 1920, and filed in the office of the State Industrial Commission on De-
46 cember 21, 1920, affirming the award of the State Industrial Commission made and entered December 15, 1919, and from the order of affirmance entered pursuant thereto in the office of the State Industrial Commission on December 21, 1920.

Now, upon reading and filing the notice of motion with admission of due service thereon, the affidavit of Artemas Ward, sworn to November 18, 1920, the affidavit of Herman S. Hertwig, sworn to November 18, 1920, the printed record on appeal herein, the said order of affirmance and the opinion of this Court accompanying the decision herein, and due deliberation having been had thereon, it is hereby

Ordered that the said motion be and the same hereby is granted, and this court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

JOSEPH H. HOLLAND,
Clerk.

47 *Notice of Appeal to Court of Appeals.*

Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of HIMAN KRINSKY for Compensation under the Workmen's Compensation Law, Claimant, against WARD & GOW, Employer-Appellant.

SIRS:

Please take notice that the employer-appellant, Artemas Ward, doing business under the trade name of Ward & Gow, hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, entered in the office of the State Industrial Commission on December 21, 1920, affirming the award of the State Industrial Commission made herein and entered in the office of the said commission on the 15th day of December, 1919, and from the award of the State Industrial Commission so affirmed, and from each and every part of the said award, and said order of affirmance.

Annexed hereto is a copy of the order of the said Appellate Division, Third Department, made January 4, 1921, granting
48 leave to the employer to appeal to the Court of Appeals from the said order of affirmance and award.

Dated, New York, January 26, 1921.

Yours, &c.,

EVERETT, CLARKE & BENEDICT,
Attorneys for Employer-Appellant.

Office & P. O. Address, No. 37 Wall Street, Borough of Manhattan, City of New York.

To:

Attorney General of the State of New York, Albany, N. Y.
State Industrial Commission, Albany, N. Y.
Carmody & Carswell, Esqs., Attorneys for Claimant, No. 2 Rector Street, Borough of Manhattan, City of New York.

49 *Opinion of Appellate Division.*

Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of HIMAN KRINSKY, Respondent, against WARD & GOW, Employer, Appellant.

Argued September, 1920; Decided November, 1920.

Present:

Hon. John M. Kellogg, Presiding Justice.
" John Woodward,
" Aaron V. S. Cochrane,
" Henry T. Kellogg,
" Michael H. Kiley,
Associate Justices.

Appeal by the Employer from an Award of the State Industrial Commission Made in Favor of the Claimant February 16th, 1920.

Appearances:

For the Appellant, Everett, Clarke & Benedict (Herman S. Hertwig, of Counsel).
For the State Industrial Commission, Charles D. Newton, Attorney General (E. C. Aiken, Deputy Attorney General, of Counsel).

COCHRANE, *J.*:

50 The employer conducts the newsstands at the various stations of the Interborough Rapid Transit Company in New York City. At such newsstands are sold periodicals and confectionary. The merchandise is collected and kept at 39 Park Place, where it is loaded on trucks and then distributed to the different newsstands. It is not disputed that in connection with such business there are more than four "workmen or operatives" within the meaning of the second Group 45 of Section 2 of the Workmen's Compensation Law (as added by-laws of 1918, Chap. 634). There are many more employees who cannot be classified as "workmen or operatives." Among the large number who cannot be thus classified is the claimant. He was a salesman at one of the newsstands of which there were 125. He received an injury which arose out of and in the course of his employment. The contention is that because he was not a workman or operative he is not within the protection of the Act. Such construction of the statute cannot be upheld. Section 2 divides employments into various groups which it characterizes as "hazardous employments." The second Group 45 includes all employments not before enumerated in which there are engaged four or more workmen or operatives under conditions more specifically described in said Group. All employees of a "hazardous employment" are within the protection of the statute irrespective of whether

or not their particular duties bring them within the hazards of the employment. Matter of Dose v. Moehle Lithographic Company, 221 N. Y. 401; Matter of Spang v. Broadway Brewing & Malting Company, 182 App. Div. 443; Joyce v. Eastman Kodak Company, 182 App. Div. 354. That is true of all the other groups of
51 Section 2 and it is impossible to make any distinction in respect to second Group 45.

The award should therefore be affirmed.

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true copies of the order of affirmance of the Appellate Division, the order of the Commissioner making the order of the Appellate Division the order of the State Industrial Commission, the order granting leave to appeal to the Court of Appeals, the notice of appeal to the Court of Appeals, the opinion of the Appellate Division, and of all the papers on which the court below acted in making said order.

Certification thereof is hereby waived and the same are hereby ordered on file in the office of the Clerk of the Court of Appeals.

Dated, February 19, 1921.

EVERETT, CLARKE & BENEDICT,
Attorneys for Employer-Appellant.
CHARLES D. NEWTON,
Attorney-General of the State of New York.
BERNARD L. SHIENTAG,
Attorney for State Industrial Commission.

52 STATE OF NEW YORK, *ss.*:

Court of Appeals.

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of April in the year of our Lord one thousand nine hundred and twenty-one, before the Judges of said Court.

Witness, the Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER,
Clerk.

Remittitur.

Apr. 20th, 1921.

53 In the Matter of the Claim of HIMAN KRINSKY for Compensation, &c., vs. WARD & GOW, &c.

Be it remembered, That on the 25th day of February, in the year of our Lord one thousand nine hundred and twenty-one Artemas Ward, doing business under the trade name of Ward & Gow, the

appellant in this cause, came here into the Court of Appeals, by Everett, Clarke & Benedict his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And State Industrial Commission the respondent in said cause afterwards appeared in said Court of Appeals by Charles D. Newton Attorney-General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

54 Whereupon, The said Court of Appeals having heard this cause argued by Mr. Herman S. Herting of counsel for the appellant, and by Mr. E. C. Aiken of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the Order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according to law.

54½ Therefore, It is considered that the said Order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

Albany, Apr. 20th, 1921.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER,
Clerk.

55 STATE OF NEW YORK:

Appellate Division, Supreme Court, Third Judicial Department.

Clerk's Office, Albany, N. Y.

In the Matter of the Claim of HIMAN KRINSKY for Compensation, &c., vs. Ward & Gow, &c.

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial

Department, do hereby certify that the foregoing is a true copy of the record on appeal and remittitur from the Court of Appeals in the above entitled proceeding as filed in this office on the 25th day of April, 1921.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court on this 12th day of May, 1921.

[Seal of Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk.

56 At a Term of the Appellate Division of the Supreme Court in and for the Third Department Held at the Court House, in the City of Albany, N. Y., Commencing on the 3rd day of May, 1921.

Present:

Hon. John M. Kellogg, Presiding Justice.
Hon. John Woodward,
Hon. A. V. S. Cochrane,
Hon. C. C. Van Kirk,
Hon. Michael H. Kiley,
Associate Justices.

In the Matter of the Claim of HIMAN KRINSKY for Compensation under the Workmen's Compensation Law against Ward & Gow, Employer, Appellant.

The above named Ward & Gow having appealed from the order of the Appellate Division of the Supreme Court, in and for the Third Department, made at a term commencing on the 9th day of November, 1920, which affirmed an award of the State Industrial Commission entered in the office of said Commission on the 15th day of December, 1919, whereby compensation was awarded to the above named Himan Krinsky, injured employee, for the period covering February 27, 1919, to September 18, 1919, at the rate of $11.54 per week, and the claim continued for further hearing; and said appeal having been argued in the Court of Appeals by Herman S. Hertwig, Esq., of counsel for the appellant, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and the Court of Appeals, after due deliberation had thereon,
57 did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs; and further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law; and the said remittitur having been filed in this court.

Now, on motion of Charles D. Newton, Attorney General, attorney for the State Industrial Commission, it is

Ordered, that the order and judgment of the Court of Appeals be and the same is hereby made the order of this court, and that the award or decision of the State Industrial Commission entered on the 15th day of December, 1919 be and the same is hereby in all respects affirmed with $98.75 costs to be paid by the appellants.

JOSEPH H. HOLLANDS,
Clerk.

58 Supreme Court of the United States.

WARD & GOW, Plaintiff-in-Error,

against

HIMAN KRINSKY and STATE INDUSTRIAL COMMISSION,
Defendants-in-Error.

To the Supreme Court of the United States:

Comes now Ward & Gow, plaintiff in error, and prays for a reversal of the order of the Supreme Court of the State of New York, entered in the office of the Clerk of the Appellate Division thereof for the Third Judicial Department of the said State on the 3rd day of May, 1921, affirming a decision and award of the State Industrial Commission of said State, a reversal of which is likewise prayed entered on the 15th day of December, 1919, and plaintiff in error further prays for a reversal of the judgment of the Court of Appeals of the said State, rendered on the 19th day of April, 1921, upon which said order hereinbefore first mentioned was entered.

And your petitioner will ever pray.

Dated, New York, May 14, 1921.

HERMAN S. HERTWIG,
Of Counsel for Ward & Gow.

59 Supreme Court of the United States.

WARD & GOW, Plaintiff-in-Error,

against

HIMAN KRINSKY and STATE INDUSTRIAL COMMISSION,
Defendants-in-Error.

To the Supreme Court of the United States and to the Honorable Justices Thereof:

The petition of Artemas Ward, doing business under the trade name of Ward & Gow, in the City and State of New York, respectfully shows:

First. On August 18, 1919, the above-named Himan Krinsky commenced, before the State Industrial Commission of the State of New York, a special proceeding against your petitioner, and therein

alleged that on February 27, 1919, while he was in the service of your petitioner as a salesman in charge of a booth maintained by your petitioner on the subway platform of the Mott Avenue Station of the subway in the Borough of the Bronx, New York City, for the sale of newspapers, periodicals, candies and gums, he was struck in the head by a subway train, and injured, when he walked out to the edge of the subway platform to empty the contents of a bottle of water on the tracks, and that by reason of the said injury,
60 he had become entitled to be awarded by the said State Industrial Commission, compensation payable by your petitioner under the provisions of Chapter 816 of the Laws of 1913 of the State of New York, as amended and re-enacted by Chapter 41 of the laws of 1914, constituting Chapter 67 of the Consolidated Laws of the State of New York, as amended by Chapter 634 of the Laws of 1918, said Act being commonly known as the Workmen's Compensation Law for the State of New York.

Second. That your petitioner leases the advertising and vending privileges on various subway and elevated lines in the City of New York, and the general nature of his business is that of selling advertising space in the cars and on the various stations, attention to placing the cards and posters for lessees of the space, the purchase of periodicals, chewing gums and candies, and the sale thereof from sales booths located on the different station platforms. In the prosecution of this general business, your petitioner employs about 366 men, the great majority of them being executives, office workers and salesmen. The business is divided into two departments, the advertising department, with headquarters uptown, at 50 Union Square, and the merchandising division, with headquarters downtown at No. 39 Park Place. In the advertising department, there are employed about 59 persons, who are all executives, advertising solicitors, artists to design cards and posters, bookkeepers, stenographers, telephone operators and office boys. Under
61 the authority of the merchandising division downtown, there are about 307 persons, consisting of 6 executives, 32 stenographers, and clerks, bookkeepers, penny counters, and office boys, 14 news-stand inspectors who travel singly over the subways inspecting news-stands, 3 watchmen, 40 collectors, who travel singly on the lines and collect the pennies from the slot machines and weighing machines, 28 card placers, who travel singly placing cards in the cars, 125 news-stand salesmen (of whom the defendant-in-error was one) each of whom is stationed in one of the sales booths at the subway and elevated stations, and who goes directly to his stand in the morning and directly home in the evening, and whose duties consist simply in keeping the display of papers, magazines, gums and candies in order, selling them, keeping an account of sales, and turning in his collections. In addition, there are employed at 39 Park Place, 9 chauffeurs, who drive trucks for the delivery of stationery and merchandise to the stations, 18 porters, 3 watchmen and 6 carpenters, who make frames for posters and repairs to ma-

chines. Thus, among the 366 employees of your petitioner, there is but a small number of manual workers, and these are insured by your petitioner under the Workmen's Compensation Law.

Third. That your petitioner contended in the said proceeding before the Commissioner that the State Industrial Commission had no jurisdiction, because (*a*) the occupation of the said claimant
62 did not fall in any of the groups over which the Compensation Law extends; and (*b*) that the Compensation Law, if intended to cover the claimant's occupation, would be unconstitutional and void, because violative of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

Fourth. That after hearing the allegations and proofs of the parties, the said State Industrial Commission rendered its written decision and award, which was entered December 15, 1919, in which it found and decided that the said claim came within the provisions of the said Workmen's Compensation Law, as amended as aforesaid, and that the said claimant was entitled to be paid by your petitioner compensation for a period covering February 27, 1919, to September 18, 1919, at the rate of $11.54 per week, and at the conclusion of the testimony, the presiding Commissioner stated the intent and purpose of the particular part of the law upon which the claim was based, namely, 2nd Group 45 added to Section 2 of the Law by Chapter 634 of the Laws of 1918, to be that where there are four or more manual workers employed by a person, every other person within the employer's service is, by virtue of that section, brought within the Compensation Law.

Fifth. From said decision and award of the State Industrial Commission, your petitioner duly appealed to the Appellate Division of the Supreme Court for the Third Judicial Department,
63 of the State of New York, where your petitioner, through his counsel, duly urged, against the validity of the said decision and award, both the contentions hereinbefore specified—(1) That 2nd Group 45, was intended to apply only to the four or more manual laborers in the service of an employer; (2) That if intended to have the effect given to it by the State Industrial Commission, viz., that where an employer has four or more "workmen or operatives" in his service, all the rest of his employees are thereby made subject to the compensation statute, no matter how numerous they may be, how harmless their individual occupations, or how far removed in place from the work of the manual laborers, then the said 2nd Group 45 would be void, as in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. The said Appellate Division of the Supreme Court overruled said contention, and by order bearing date the 9th day of November 1920, and thereafter filed in the office of the Clerk of the Appellate Division, affirmed said decision and award of the State Industrial Commission. In its opinion accompanying this decision, the Appellate Division said—

"It is not disputed that in connection with such business (your petitioner's business) there are more than four 'workmen or operatives' within the meaning of 2nd Group 45 of Section 2 of the Workmen's Compensation Law (as added by Laws of 1918, Chapter 634). There are many more employees who cannot be classified as 'workmen or operatives.' Among the large number who cannot be thus classified is the claimant."

54 The court then proceeded to state that "all employees of a 'hazardous employment' are within the protection of the statute, irrespective of whether or not their particular duties bring them within the hazards of the employment" and cited in support of this ruling certain cases of the New York courts. The cases so cited, however, were all cases where the principal business of the employer was that of prosecuting work described in some group of Section 2 as hazardous. In such case it is provided by Subdivision 4 of Section 3 that all employees in the service of the employer, whose principal business is hazardous, become subject to the law. It may be conceded that it was entirely reasonable for the Legislature to decide that where the principal business of the employer is hazardous, all his employees may fairly be deemed to be more or less affected by the hazard. But that is manifestly a very different proposition from the one presented by this case under 2nd Group 45, where the principal business is concededly non-hazardous, and where the vast majority of the employees (including the claimant Krinsky) performed non-hazardous duties and are in no way associated with or affected by the operations of the small number of manual workers.

Sixth. Thereafter, on motion of your petitioner, the said Appellate Division of the Supreme Court, Third Department, granted leave to your petitioner to appeal to the Court of Appeals of the 55 State of New York from the said order of the Appellate Division affirming the said award of the State Industrial Commission. The said Court of Appeals of the State of New York then was and still is the highest court of the State of New York in which a decision of the questions so raised by your petitioner could be had. Thereafter, the said appeal thus allowed was duly taken and was duly heard in the Court of Appeals, but the said Court of Appeals overruled the contentions of your petitioner and affirmed the said order of the Appellate Division of the Supreme Court, to which court the said Court of Appeals sent down its remittitur, consisting of a copy of the judgment of the said Court of Appeals and of the papers upon which said Court of Appeals made its said judgment, and said remittitur was filed in the office of the Clerk of the said Appellate Division on the 25th day of April, 1921, in which office the said remittitur now remains of record. Upon said remittitur an order was entered on May 3, 1921, in the office of the Clerk of the said Appellate Division, whereby the said order and judgment of the Court of Appeals were made the order of the said Appellate Division, and the sum of $98.75, costs of said appeal to the Court of Appeals, was awarded against your petitioner.

The case of Europe v. Addison Amusements, Inc., and others, and this case, which were argued and decided in the Court of Appeals at the same time, were the first cases to bring before that Court the question of the validity of 2nd Group 45 of Section 2 of the Workmen's Compensation Law aforesaid. The opinion of the court, a copy of which is hereto annexed, was written in the Europe
66 case. In this opinion the court took the same position as the court below as to the scope and effect of 2nd Group 45.

Seventh. As the case now stands, therefore, there has been added to the Compensation Law of the State of New York the 2nd Group 45, in which the New York Legislature declared that wherever an employer has in his service four or more manual workers, all the rest of his employees thereby become entitled to the benefits of the compulsory compensation law, although all the rest of the employees other than the four manual workers may number hundreds or thousands, may be engaged in work entirely non-hazardous and may perform their services in places far removed from the place where the four manual workers operate, and never come in contact in any way with the said four manual workers. In the case of your petitioner, there was only a very small number of manual workers, and all the rest of your petitioner's 366 employees performed only such services as are conspicuously non-hazardous, and the work of the claimant himself was concededly non-hazardous, was removed many miles from the place of work of the few manual workers, and was not affected in any way by such work. Your petitioner contends that in such case the statute above mentioned, compelling your petitioner to provide compensation for all his 366 employees just because he employs about a score of workmen in manual service, and to maintain the insurance therefor required by the Act, is violative of the Fourteenth Amendment to the Federal Constitution, deprives him of property without the process of law, and denies to him the equal
67 protection of the laws. Your petitioner believes that the constitutional validity of such statute has not yet been passed upon by this Honorable Court. The only act of this nature that has yet been passed upon by the court, so far as your petitioner can find, is the Ohio statute passed upon in Jaffray v. Blagg, 235 U. S. 571. But the statute passed upon in that case was in terms limited in its operation to the "workmen and operatives" and did not purport to cover employees who were not "workmen or operatives." The present statute is radically different, in that it is intended to cover, as above stated, not only the "workmen or operatives" themselves, but all other employees of the employer.

Eighth. That under and by virtue of Section 23 of the said Workmen's Compensation Law, the said State Industrial Commission, composed of Edward F. Boyle, James M. Lynch, Henry D. Sayer, Frances Perkins and Cyrus W. Phillip, was a party both to said appeal in the Appellate Division of the Supreme Court, and to said appeal in the Court of Appeals of the State of New York, and appeared therein by the Attorney-General of the State of New York, in support of the validity of its award to the claimant herein, and of the

2nd Group 45 of Section 2 of said Workmen's Compensation Law, under which the said award was made.

68 Wherefore your petitioner prays that a writ of error may be allowed and issued herein to the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to send to the Supreme Court of the United States all and singular the record and papers in said special proceeding, and for citation and supersedeas to stay execution to the end that the errors of which your petitioner complains herein and in the assignment of errors herein filed, may be reviewed, and if errors be found, corrected conformably to the Constitution and Laws of the United States.

And your petitioner will ever pray.

Dated, May —, 1920.

ARTEMAS WARD,
By HERMAN A. HERTWIG,
Counsel.

69 STATE OF NEW YORK,
County of New York, ss:

Artemas Ward, being duly sworn, deposes and says: That he is the petitioner herein, and has read the foregoing petition. That the contents thereof he knows to be true.

ARTEMAS WARD.

Sworn to before me this 12th day of May, 1921.

[Seal of Marion A. Dillon, Notary Public, New York County.]

MARION A. DILLON,
Notary Public, New York County, No. 73.

N. Y. County Register No. 2032.

70 In the Matter of the claim of WILLIE A. EUROPE, Widow of James Reese Europe, for Compensation Under the Workmen's Compensation Law, Claimant, Respondent, v. Addison Amusements, Inc., Employer, and United States Casualty Company, Insurance Carrier, Appellants; State Industrial Commission, Respondent.

This is an appeal from an order of the Appellate Division affirming an award of the State Industrial Commission made to the widow of James Reese Europe, the conductor of "Europe's Band."

William H. Hotchkiss for appellant.

Charles D. Newton, attorney-general (E. C. Aiken of Counsel), and Bernard L. Shientag for State Insdustrial Commission; Charles E. Toney for claimant-respondent.

The Legislature in adding to the ground of hazardous employments any business where four or more workmen or operatives are regularly employed did not exceed its powers.

It is accordingly held that an injury sustained by the leader of a band touring under the employment of an amusement corporation employing four or more persons in connection therewith came within the provisions of the Workmen's Compensation Law (Sec. 2, group 45).

CRANE, *J.*:

Lieutenant James Reese Europe was the conductor of a famous negro band which accompanied the 365th Infantry (the 15th New York) to France shortly after the United States entered into the late war with Germany.

Europe was a musical composer, director and orchestra leader. After the band's return from Europe at the conclusion of the war it started on a concert tour throughout the United States under a contract with or employment by the Addison Amusements, Inc. This company was formed for the purpose of supplying Europe's band with engagements and conducting through it the entertainment business. It employed Europe and all the musicians. During an intermission in the programme of a concert given at Mechanics Hall in the City of Boston on the 9th day of May, 1919, Europe was stabbed and killed by a drummer of the band.

The Industrial Commission has made an award to his widow, Willie A. Europe, of $6.924 weekly during widowhood and $100 on account of funeral expenses.

The basis for this allowance is section 2, second group 45, of the Workmen's Compensation Law (Cons. Laws, Chap. 67), which reads as follows:

"Section 2. Application. Compensation provided for in
71 this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

Group 45. All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants."

The Addison Amusements, Inc., employed a band of sixty-five pieces, for the purpose of giving concerts for hire. It was not a business enumerated in any of the other groups of section 2 and therefore came within the first words of the sentence: "All other employments not hereinbefore enumerated." The evidence permitted the finding that it employed with the band four or more workmen or

operatives regularly, who accompanied the band and therefore were engaged in the same business. These workmen were the following: Lloyd Gibbs, a stage manager who arranged the platforms, chairs and scenery; a man named Lightfoot, who handled the baggage, taking it to and from the theatre and placing it in the proper dressing rooms; another man named Jackson, who assisted Lightfoot in this manual work of handling the baggage, and a fourth man named Coleman, who took care of the uniforms of the men, pressing, cleaning and repairing them. Although these four men took some part at times in entertaining, their principal work was the manual labor connected with maintaining such a band.

Europe, the Conductor, was an employee of the Addison Amusements, Inc., and although not himself engaged in hazardous work, was engaged in a business classified by this law as a hazardous employment. By subdivision 4, section 3, "employee" means "a person engaged in one of the occupations enumerated in section 2 or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer, and shall not include farm laborers or domestic servants."

The Legislature, in Section 2, has classified certain employments as hazardous, and has given the right of compensation to employees engaged in such hazardous employments.

By the amendment of subdivision 4, section 3, Laws of 1916 (Chap. 622, sec. 2), an employee to be entitled to compensation is no longer required to be himself engaged at the time of accident in hazardous work. It is sufficient that he is an employee in
72 such hazardous business (Matter of Dose v. Moehle Lithographic Co., 221 N. Y. 401).

Group 45, as above quoted, was added by the Laws of 1918 (Chap. 634, sec. 2). The Legislature classified as hazardous employment all those occupations in which there were regularly engaged four or more workmen or operatives. It covered employments not specified in the other subdivisions. No doubt it was considered a risk to be in an employment where four or more manual laborers or operatives were engaged. It is not necessary for us finally to define or limit the words "workmen" or "operatives" as used in this subdivision. Generally speaking a workman is a man employed in manual labor, whether skilled or unskilled, an artificer, mechanic or artisan, and an operative is a factory hand, one who operates machinery (Webster's New International Dictionary). There is a marked distinction between a workman and an employee. Although in a general sense all workmen and operatives are employees, yet all employees are not workmen or operatives within the meaning of this law. The words "workmen" and "operatives" are used in their narrower meaning. (Matter of Bowne v. Bowne Co. 221 N. Y. 28).

Europe, however, was an employee within the meaning of section 3, subdivision 4, employed in a business or enterprise classified as hazardous because it employed regularly four workmen or operatives,

The evidence permitted the finding that the four men above named did manual work consisting of moving scenery arranging the stage, handling baggage and cleaning and pressing clothes.

Why the Legislature should have extended by the second group of subdivision 45 the hazardous employments to any employment having four workmen or operatives is not for us to say. The courts in construing statutes are not concerned with the wisdom of the legislation. (Matter of Wilson v. Dorflinger & Sons, 218 N. Y. 84, 86.)

We do not think, however, that the Legislature has exceeded its powers of classification by this extension of hazardous employments. It may be, as above intimated, that a business not ordinarily hazardous becomes such at times when manual work is done or machinery operated in connection with its main purpose.

Whether or not the Legislature can extend the benefits of compensation to all employments irrespective of workmen's hazards, we are not called upon, at this time, to decide (Arizona Employers' Liability Cases, 250 U. S., 400, 429; N. Y. Central R. R. v. White, 243 U. S. 188).

73 The orders of the Appellate Division and the State Industrial Commission should be affirmed, with costs.

Hiscock, Ch. J.; Chase, Cardoza, Pound, McLaughlin and Andrews, J. J. concur.

Orders affirmed.

74 [Endorsed:] Supreme Court of the United States. Ward & Gow, plaintiff-in-error, against Himan Krinsky and State Industrial Commission, defendants-in-error. Prayer for Reversal and Petition for Writ of Error. Everett, Clarke & Benedict, Attorneys for Plaintiff-in-error, No. 37 Wall Street, Borough of Manhattan, New York City.

75 Supreme Court of the United States.

WARD & GOW, Plaintiff-in-Error,

against

HYMAN KRINSKY and STATE INDUSTRIAL COMMISSION, Defendants-in-Error.

Know all men by these presents: That we, Ward & Gow, of #50 Union Square, New York City, as Principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, and having an office and usual place of business t No. 47 Cedar Street, in the Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto Hyman Krinsky in the full and just sum of One Thousand ($1,000.00) Dollars, lawful money of the United State- of America, to be paid to the said Hyman Krinsky, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of May, 1921.

Whereas, an order was entered on May 3rd, 1921, in the Office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, upon the remittitur of the Court of Appeals of the State of New York, whereby an order was made by the State Industrial Commission on December 15th, 1919, awarding compensation to Hyman Krinsky, under the provisions of the Workmen's Compensation Law, as amended, and awarding the sum of $98.75 costs on said appeal to the Court of Appeals against Ward & Gow and the said Ward & Gow, having obtained a writ of error and filed a copy thereof in the Clerk's Office of said
76 Court to reverse the said order and award and a citation directed to Hyman Krinsky and State Industrial Commission, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, therefore, the condition of the above obligation is Such, That if the said Ward & Gow shall prosecute its writ of error to effect, and answer all damages and costs if it fails *it* make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ARTEMAS WARD,
Doing Business under the Trade Name of Ward & Gow.

[Seal of the United States Fidelity and Guaranty Company.]

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By S. FRANK HEDGES, *Attorney-in-fact.*

Sealed and Delivered in the Presence of:
MARION A. DILLON.

Attest:
WILLIAM H. ESTWICK,
Attorney-in-fact.

STATE OF NEW YORK,
County of New York, ss:

On this 12th day of May, 1921, personally appeared before me, Artemas Ward, doing business under the trade name of Ward & Gow, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same for and on behalf of said firm.

[Seal of Marion A. Dillon, Notary Public, New York County.]

MARION A. DILLON,
Notary Public, New York County, No. 78.

N. Y. County Register No. 2032.

77 STATE OF NEW YORK,
County of New York, ss:

On the 10th day of May, 1921, before me personally came S. Frank Hedges, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the said Company has received from the Superintendent of Insurance of the State of New York a certificate of solvency and of its sufficiency as surety or guarantor, under Chapter 182 of the Insurance Law of the State of New York as amended by Chapter 182 of the Laws of 1913, and that such certificate has not been revoked. And the said S. Frank Hedges further said that he is acquainted with William H. Estwick and knows him to be the Attorney-in-fact of said Company; that the signature of said William H. Estwick, subscribed to the within instrument, is in the genuine handwriting of said William H. Estwick and was subscribed thereto by like order of said Board of Directors, and in the presence of him the said S. Frank Hedges.

AUGUSTUS WALLAMER,
Notary Public, Queens County No. 2079.

Certificate filed in New York County No. 225 Register's No. 3208.
Richmond, Westchester, Nassau, Orange, Suffolk & Rockland Counties.
Term expires March 30, 1928.

At a special meeting of the Board of Directors of the United States Fidelity and Guaranty Company, held at the office of the Company, in the City of Baltimore, State of Maryland, on the 26th day of October, A. D. 1920, the following resolution was unanimously adopted:

Resolved, That Alonzo Gore Oakley, or Edw. R. Lewis, or Adolphus A. Jackson, or William H. Estwick, or Gilman Ashburner, or A. Van Tambacht, or J. Frank Supplee, or E. G. Babcock, or George A. Reading, or C. D. Marsac, or S. Frank Hedges, or Charles E. Finken, or Kearn J. Mullen, or Albert J. Rowland, or Kenneth H. Wood, Attorneys-in-fact of this Company in the State of New York, be and they hereby are, and each of them is authorized and empowered to execute and deliver and to attach the seal of the Company to any and all bonds and undertakings for or on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required, including co-suretyship and reinsurance agreements, and all other bonds, undertakings or guarantees of whatsoever nature

not specifically covered by the foregoing authority; such bonds, undertakings and agreements however, to be attested in every instance by one other of the persons above named, as occasion may require, provided that if such bonds, undertakings and agreements are not executed by either Alonzo Gore Oakley, or Edw. R. Lewis, or Adolphus A. Jackson, or William H. Estwick, then and in such event said bonds, undertakings and agreements shall be attested by either the said Alonzo Gore Oakley, or Edw. R. Lewis, or Adolphus A. Jackson, or William H. Estwick; and the aforesaid Attorneys-in-fact are, and each of them is hereby authorized and empowered to certify a copy of this resolution under the seal of this Company.

STATE OF NEW YORK,
County of New York, ss:

I, S. Frank Hedges, Attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 10th day of May, 1921.

[Seal of the United States Fidelity and Guaranty Company.]

S. FRANK HEDGES,
Attorney-in-fact.

United States Fidelity and Guaranty Company,

Baltimore, Md.

At the Close of Business December 31, 1920.

Commenced Business August 1, 1896.

Assets.

Par value.		Market value.
$7,060,650.00	Government Bonds	$6,767,881.25
5,479,549.72	Baltimore City and other Municipal, State and County Bonds	5,016,429.71
2,297,600.00	Railroad and Equipment Bonds	1,965,302.00
235,000.00	Electric Railway Bonds	176,650.00
3,904,658.22	Public Utility and Miscellaneous Bonds	3,598,555.73
286,215.00	Bank and Trust Company Stocks	146,606.00
168,600.00	Railroad Stocks	680,944.50
458,375.00	Miscellaneous Stocks	358,279.50
100,000.00	Lawyers Surety Co. Stock, represented by $150,000 New York City Bonds deposited with the Superintendent of Insurance of the State of New York, and other assets	140,000.00
$19,990,647.94	Total Bonds and Stocks—Market Values December 31, 1921	$18,850,648.69
	Home Office Property, appraised by Insurance Department of Maryland	750,000.00
	Other Property appraised by Insurance Department of Maryland	54,240.12
	Home Office Addition, Calvert, Mercer and Water Streets (Payments on Account)	100,494.23
	New York Property, appraised by Insurance Department of New York	850,000.00
	Loans secured by pledge of Collaterals	93,544.92
	Loans secured by Mortgages	55,300.00
	Cash on Hand and in Depositories	3,378,487.34
	Premiums in course of collection, not more than three months due	5,579,406.16
	Deposits with Workmen's Compensation Reinsurance Bureau	372,773.74
	Interest due and accrued	251,553.20
	Due for Subscriptions, Department and Guaranteed Attorneys	88,842.25
	Deposits with New York Excise Committee	37,395.21
	Other Assets	74,440.61
		$30,537,126.47

Liabilities.

Capital Stock paid in cash		$4,500,000.00
Due for Return Premiums and Reinsurance		6,794.14
Funds held under Reinsurance Treaties		34,642.78
Reserve for 1921 Taxes and Expenses in Transit		619,205.49
Commissions accrued on uncollected premiums		1,098,505.45
Premium Reserve Computed in Accordance with Requirements of New York Insurance Dept.	$10,240,491.90	
Reserve for Claims Admitted and not Admitted, all Depts., in accordance with New York Laws	9,705,416.93	
Surplus	4,332,069.78	
		24,277,978.61
		$30,537,126.47

STATE OF NEW YORK,
County of New York, ss:

S. Frank Hedges, being duly sworn, says: that he is the Attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of September 30, 1920, and that the financial condition of said Company is as favorable now as it was when such statement was made.

[Seal of United States Fidelity and Guaranty Company.]

S. FRANK HEDGES.

Subscribed and sworn to before me this 10th day of May, 1921.
AUGUSTUS WALLANGER,
Notary Public, Queen's County, No. 2079.

Certificate filed in New York County No. 225, Register's No. 8208.
Richmond, Westchester, Nassau, Orange, Suffolk, & Rockland Counties.
Term expires March 30, 1928.

78 [Endorsed:] County Clerk's File No. —. Supreme Court of the United States. Ward & Gow, Plaintiff-in-error, against Hyman Krinsky, and State Industrial Commission, Defendants-in-error. Supersedeas Bond. Everett, Clarke & Benedict, attorneys for plaintiff-in-error, 37 Wall Street, Manhattan, New York City. The within undertaking is approved as to form and as to the sufficiency of the surety. Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

79 Supreme Court of the United States.

WARD & GOW, Plaintiff-in-Error,

against

HIMAN KRINSKY and STATE INDUSTRIAL COMMISSION, Defendants-in-Error.

Comes now Ward & Gow, plaintiff-in-error, and makes and files this its assignment of errors:

1. The Court of Appeals of the State of New York, in affirming, by its judgment herein rendered April 19, 1921, the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, entered November 9, 1920, erred, as did also said Appellate Division and the State Industrial Commission of the State of New York, in overruling the contention of your petitioner that its award to the above-named Himan Krinsky of compensation in this proceeding under the provisions of Chapter 816 of the Laws of 1913, as amended and re-enacted by Chapter 41 of the Laws of 1914, constituting Chapter 67 of the Consolidated Laws of the State of New York, as amended by Chapter 634 of the Laws of 1918, commonly known as the Workmen's Compensation Law, would deprive your petitioner of his property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

80 2. The Court of Appeals of the State of New York, in affirming, by its judgment herein rendered April 19, 1921, the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, entered November 9, 1920, erred, as did also said Appellate Division and the State Industrial Commission of the State of New York, in overruling the contention of your petitioner that its award to the above-named Himan Krinsky of compensation in this proceeding under the provisions of Chapter 816 of the Laws of 1913, as amended and re-enacted by Chapter 41 of the Laws of 1914, constituting Chapter 67 of the Consolidated Laws of the State of New York, as amended by Chapter 634 of the Laws of 1918, commonly known as the Workmen's Compensation Law, would deny to your petitioner the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Dated, May 14, 1921.

HERMAN S. HERTWIG,
Of Counsel for Ward & Gow.

81 [Endorsed:] Supreme Court of the United States. Ward & Gow, Plaintiff-in-error, against Himan Krinsky and State Industrial Commission, Defendants-in-error. Assignments of Error. Everett, Clarke & Benedict, Attorneys for Plaintiff-in-error, No. 37 Wall Street, Borough of Manhattan, New York City.

82 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Appellate Division of the Supreme Court of the State of New York in and for the Third Judicial Department of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Appellate Division upon a remittitur from the Court of Appeals of the State of New York before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Ward & Gow, appellant and Himan Krinsky, respondent and State Industrial Commission wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their
83 being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said appellant, Ward & Gow, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Joseph McKenna, Senior Associate Justice of the Supreme Court of the United States, the 20th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

84 [Endorsed:] Supreme Court of the United States, October Term, 191-. Ward & Gow, plaintiff-in-error, vs. Himan Krinsky and State Industrial Commission, defendants-in-error. Everett, Clarke & Benedict, Attorneys for Plaintiff-in-Error, 37 Wall Street, Manhattan, New York City. Writ of Error.

85 UNITED STATES OF AMERICA, *ss:*

To Himan Krinsky and State Industrial Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Appellate Division of the Supreme Court of the State of New York in and for the Third Judicial Department of the State of New York, wherein Ward & Gow is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this 20th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

86 [Endorsed:] Supreme Court of the United States. Ward & Gow, Plaintiff-in-error, against Himan Krinsky and State Industrial Commission, Defendants-in-error. Citation. Everett, Clarke & Benedict, Attorneys for Plaintiff-in-error, Office & P. O. Address, No. 37 Wall Street, Manhattan, New York City. Service of the within citation and receipt of a copy thereof for the State Industrial Commission is hereby admitted this 25 day of May, 1921. Charles D. Newton (E. C. A.), Attorney-General of the State of New York.

On this 24th day of May, in the year of our Lord one thousand nine hundred and twenty-one, personaly appeared Charles J. Healy before me, the subscriber, who, being duly sworn, says that he is above the age of twenty-one years; that he is a citizen and resident of the State of New York, residing in Manhattan, New York City, and a citizen of the United States, and makes oath that he delivered a true copy of the within citation to Hiram Krinsky at 807 Manor Avenue, Woodhaven, Long Island, State of New York, on May 23, 1921, and at the same time exhibited to him the original signature of the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, and that he knew the said person so served to be Himan Krinsky described in the annexed citation.

CHARLES J. HEALY.

Sworn to and subscribed the 24th day of May, A. D. 1921.

[Seal of Marion A. Dillon, Notary Public, New York County.]

MARION A. DILLON,
Notary Public, New York County, No. 73.

N. Y. County Register No. 2032.

STATE OF NEW YORK,
County of Albany, ss:

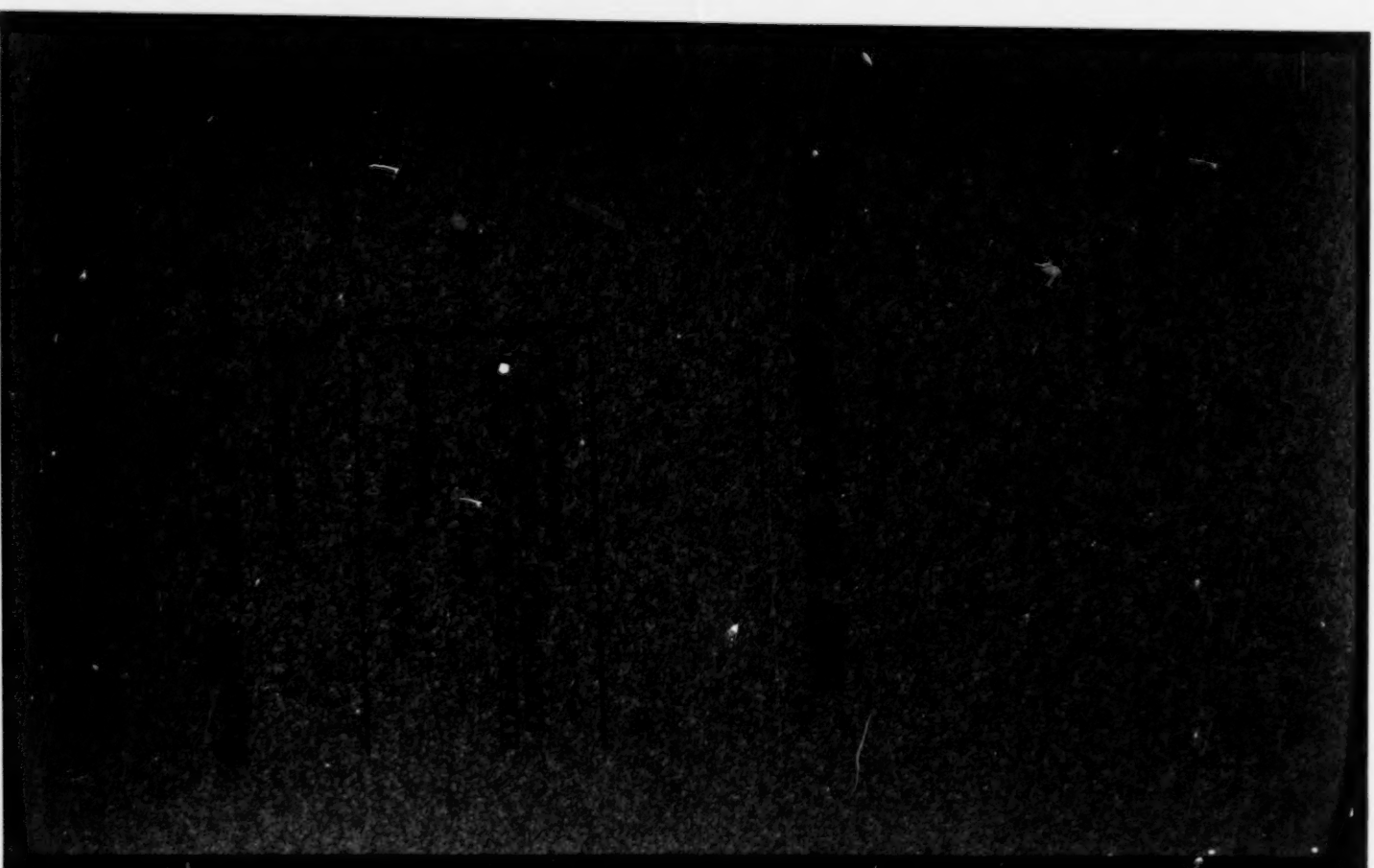
I, Joseph H. Hollands, Clerk of the Supreme Court of the State of w York, Appellate Division, Third Department, pursuant to a writ error directed to the Honorable the Judges of the said Appellate vision, Third Department, which said writ was allowed by the norable Louis D. Brandeis, Associate Justice of the Supreme Court the United States, and signed by the Clerk of the Supreme Court the United States on May 20, 1921, do hereby certify the writing reto annexed to be a true, complete and perfect copy of the record assignments of error and of all proceedings in the case of Himan insky, claimant-respondent, against Ward & Gow, defendant-ap-lant, as fully as the same remain on file and of record in my office. In witness whereof, I hereunto subscribe my name and affix the l of the said Court, this 1st day of June, 1921.

[Seal of the Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk.

Endorsed on cover: File No. 28,298. New York Supreme Court, pellate Division, Third Judicial Department. Term No. 343. rd and Gow, plaintiff in error, vs. Himan Krinsky and State In-trial Commission. Filed June 4th, 1921. File No. 28,298.

(4155)



Supreme Court,

OF THE UNITED STATES.

OCTOBER TERM—1921.

WARD & GOW, *Plaintiff-in-Error,* —against— HIMAN KRINSKY and STATE INDUSTRIAL COMMISSION, *Defendants-in-Error.*	No. 343.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of the Case.

This cause comes up on writ of error to the Appellate Division of the Supreme Court of the State of New York in the Third Department (fols. 82, 83) under Sec. 237 of the Judicial Code. It brings up for review a judgment of that court on remittitur from the Court of Appeals of the State of New York, affirming an award of compensation to the defendant-in-error, Himan Krinsky, by the defendant-in-error, State Industrial Commission, under the Workmen's Compensation Law of the State of New York (fols. 56-58). The award was made under a provision of the Compensation Act added by Chapter 634 of the Laws of 1918 to Section 2 of that law and known as 2nd Group 45. This provision

enlarged the list of "hazardous employments" subject to the Compensation Law by including:

> "All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about that same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants."

The right to compensation was contested on the ground that 2nd Group 45, if construed to cover the case of the defendant-in-error Himan Krinsky, was unconstitutional and void as being in contravention of the "due process" and "equal protection" clauses of the Fourteenth Amendment (fols. 18, 34, 35). In the discussion of this contention before the commission (fol. 35) the decision of this Court to which we referred was *Jeffrey* v. *Blagg*, 235 U. S. 571.

The Compensation Law provides (Sec. 68) that the commission in "conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter," and (Sec. 23) that "it shall not be necessary to file exceptions to the rulings of the commission." It provides also the Industrial Commission shall be a party to any appeal.

Plaintiff-in-error leases the advertising and vending privileges on various subway and elevated lines in the City of New York. The general nature of the business is that of selling

advertising space in the cars and on the various station platforms, attention to the placing and removal of cards and posters for advertisers, the purchase of periodicals, chewing gums and candies, and the sale of these articles in booths located on the station platforms (fol. 28). In the prosecution of this business, about 366 men are employed (fol. 28), the majority of them being executives, office workers and salesmen.

The business is divided into two departments of about equal importance (fol. 32), one known as the Advertising Department, with headquarters uptown in Manhattan at 50 Union Square, and the other known as the Merchandising Department, with headquarters downtown at 39 Park Place (fols. 29, 30).

In the Advertising Department, about 59 persons are employed, all being executives, advertising solicitors, artists employed to design cards and posters, bookkeepers, stenographers, office boys and telephone operators (fol. 29).

Under the authority of the Merchandising Department there are about 307 employees (fol. 31). These consist of six executives, 32 office workers—clerks, stenographers, bookkeepers, penny counters, office boys and messengers (fol. 29)—14 newsstand inspectors who travel singly over the different elevated and subway lines to inspect the displays and see that the sales booths are properly kept, 9 chauffeurs who drive the trucks transporting the merchandise from the central depot at 39 Park Place to the different subway and elevated stations, 18 porters engaged to load and unload the motor trucks, 40 collectors, who travel singly over the subway and elevated lines to collect the pennies from the slot machines

and weighing machines, 6 carpenters who make frames for the posters and repairs to the slot and weighing machines, 17 bill posters who travel singly or in pairs, posting advertising matter at the various station platforms, 28 card placers who travel singly, placing and removing advertising cards and three watchmen (fols. 30, 31). In addition there are 125 newsstand salesmen (fol. 30). Each of these is stationed at a booth in the subway or elevated stations and works entirely separate and apart from the rest of the employees. Each goes directly to his stand in the morning and directly home in the evening and his duties consist simply of keeping the display of papers, magazines, chewing gums and candies in order, selling them across the counter, keeping an account of sales and turning in his collections (fols. 18, 22, 30). The only other employees with whom a salesman comes in contact are the inspector and the chauffeur who brings the supplies from the truck either down into the subway or up onto the elevated platform and passes them across the counter (fols. 32, 33).

The defendant-in-error, Himan Krinsky, was a newsstand salesman, stationed in a booth on the south bound platform of the Mott Avenue subway station in the Bronx (fol. 21). The booth was a steel structure 12 feet long, 8 feet wide and 2½ feet deep, located against the wall 10 feet back from the edge of the platform (fol. 22).

In keeping the booth and contents free from dust, the salesman used water which he kept for that purpose in a pail or bottle and which he obtained from a washroom two flights of stairs up from the train level (fols. 19, 22). At the time of the accident, he claimed to have walked

to the edge of the platform to pour the contents of the bottle upon the train track, although he was allowed to close his stand and go to the washroom to empty the pail or bottle (fol. 22). He leaned over the edge of the platform while pouring out the water and an incoming train struck him (fol. 18) on the left temple inflicting injuries which he claimed incapacitated him for work (fols. 37, 38).

It was conceded that his occupation was not subject to the Workmen's Compensation Law unless it was covered by 2nd Group 45. As construed by the State Courts, this group has this effect: Wherever an employer has in his service four or more "workmen or operatives," that fact subjects to the Compensation Law all the rest of his employees, no matter how numerous or how completely isolated from the "workmen or operatives," or how safe their individual occupations may be. (Industrial Commission, fol. 34; Opinion of Appellate Division, fol. 50; Opinion of Court of Appeals in the *Matter of Europe*, argued and decided with this case, fol. 72). It was conceded likewise that the claimant was not a "workman or operative" (fols. 33, 34, 50, 72).

Assignments of Error.

These are printed *in extenso* at page 46 of the record, and are briefly that 2nd Group 45 of the Compensation Law, as thus construed, is in conflict with the Fourteenth Amendment of the Federal Constitution in that (1) it deprives plaintiff-in-error of his property without due process of law; and (2) it denies to plaintiff-in-error equal protection of the laws.

POINT I.

Second Group 45 of the Compensation Law, as interpreted by the State courts, violates the due process and equality clauses of the Fourteenth Amendment.

The two points are so closely related that they may conveniently be considered together, especially as the authorities affecting the one invariably deal also with the other.

It is now firmly settled, of course, that compulsory compensation laws may properly be enacted under the police powers of the States where the inherent hazards of an employment make it proper for the State in the interest of the public welfare to extend protection over the workers subject to the hazards. This principle was thoroughly considered and clearly stated in the opinion upholding the New York Compensation Act as originally passed, including at that time 42 groups of "hazardous employments."

> *New York Central Railroad Co.* v. *White,* 243 U. S. 188 at 206.

See also

> *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 239, 242;
> *Arizona Employers Liability cases,* 250 U. S. 400, 425.

The exercise of such power by the States is subject, however, to the "equal protection" clause of the Fourteenth Amendment.

> *Atchison & Sante Fe* v. *Vosburg,* 238 U. S. 56, 59.

In classifying occupations as hazardous for the purpose of such laws, the action of the Legislature must bear reasonable relation to the facts and may not be merely arbitrary.

> *Gulf, Columbus & Sante Fe Railway Co.* v. *Ellis,* 165 U. S. 150, 155 (bottom), 159, 165 (bottom);
> *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 558, *et seq.*;
> *Southern Railway Co.* v. *Green,* 216 U. S. 400, 417.

Down to the present time, it has been expressly recognized, both by courts and by legislatures, that hazard must in fact exist in an occupation to afford a basis for the exercise of the police power through such legislation. Thus in the New York law, as in the laws of other states, the enumeration of occupations made subject to the law is prefaced by the words "* * * the following *hazardous* employments." (N. Y. Law, Sec. 2; Washington Law, Sec. 2, see 243 U. S. 229; Arizona Law, Sec. 4, see 250 U. S. 444.) By hazard is meant inherent dangers greater than those existing in the innumerable occupations commonly regarded as non-hazardous.

> *Mountain Timber Company* v. *Washington,* supra, pp. 229, 239, 242, 243;
> *Arizona Employers' Liability Cases,* 250 U. S. 400, 425, 428.

In the latter case, Mr. Justice McKenna, in his dissenting opinion, expressed the fear that that decision would establish the principle (page 435)

> "that it is competent for Government to charge liability and exempt from responsibility according as one is employer or employee, there being no other circumstance than that relation."

Or, as the same justice stated the proposition again at page 437—

> "It is now, I think, of pertinent inquiry whether the quality of being hazardous is an inherent and necessary element of legality or a matter of legislative definition and policy. Besides, if there can be liability without fault in one occupation and that can be a principle of legislation, why not in any other."

The majority of the court, however, upheld the statute then under consideration as one dealing with "certain specified employments *designated as inherently hazardous and dangerous to workmen —and reasonably so described*" (page 420).

In the *Europe* case, argued in the Court of Appeals with this case, that court said (fol. 72) "Whether or not the Legislature can extend the benefits of compensation to all employments irrespective of workmen's hazards, we are not called upon, at this time to decide" (citing *Arizona Employers' Liability Cases,* supra, and *N. Y. Central R. R.* v. *White,* supra). Inasmuch as no constitutional question was raised or argued by the employer in the *Europe* case, this statement was made presumably in reference to argument on the question of constitutionality in the present case. If so, we think that the Court of Appeals was in error and that this case does squarely present just that question.

A brief sketch of the development of the Compensation Law will show how its scope has been gradually widened until in the group under review it reached and passed the limits of police power. The compensation plan was put into operation first over certain conspicuously hazardous occupations like mining, railway operation, construction work, quarrying, etc., described in 42 groups. After the validity of the law was upheld in *N. Y. Central Railroad* v. *White*, supra, in regard to such obviously hazardous employments, it was next extended in 1916 by amendment of Section 3 (Laws of N. Y., 1916, ch. 622) to embrace every employee whose employer was prosecuting one of the hazardous operations as his principal business, whether the occupation of the employee himself was hazardous or non-hazardous:

> "'Employee' means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment * * *" (Sec. 3, subd. 4).

This extension was founded apparently on the theory that where the principal business is hazardous, the legislature may reasonably assume that all employees are in some manner affected by the hazard of the principal operation. This extension was applied in the following cases cited in the opinions of the Appellate Division and Court of Appeals.

> *Matter of Dose* v. *Mochle Lithographic Co.*, 221 N. Y. 401;
> *Matter of Spang* v. *Broadway Brew-*

ing & Malting Co., 182 App. Div. 443;
Joyce v. *Eastman Kodak Co.*, 182 App. Div., 354.

The validity of it under the constitution was not discussed in any of these cases, and, so far as we can discover has not been considered either in the State courts or in this court. It may well be open to serious question. Any discussion of the question, however, would be improper here since the principal business of the plaintiff-in-error is concededly non-hazardous.

The New York Legislature took as a point of departure in its next enlargement of the scope of the law a provision of the Ohio Workmen's Compensation Law characterizing as inherently hazardous the work of manual laborers in groups of five or more. This provision (Gen. Code of Ohio, Secs. 1465-60) was that—

> "All employers who employ five or more workmen or operatives regularly in the same business or in or about the same establishment who shall not pay into the State Insurance Fund the premiums provided by this Act shall be liable to their employees for damages suffered", etc.

In the case of *State* v. *Creamer*, 85 Ohio State, 349, the constitutionality of this enactment was assailed on the ground, among others, that the restriction of its application to the five or more workmen or operatives only instead of making it apply to all the employees of an employer, rendered it unreasonably discriminatory and void. The Ohio Court in overruling this contention said at page 405:

> "Nor do we think it an objection that the law applies *only* to workmen and operatives and not to all others. *This classification brings within the law all employees within its reason.*"

The validity of the law came before the same court again in *Jeffrey* v. *Blagg*, 90 Ohio State, 376, and was again upheld on the authority of *State* v. *Creamer* (*supra*). *Jeffrey* v. *Blagg* then came before this court on writ of error and the validity of the Ohio statute under the Federal Constitution was upheld by this court (235 U. S. 571). The basis for the holding seems to have been that the mere association of manual workers in group labor necessarily renders their work hazardous by reason of the concurrence in such group labor of so many imperfect human factors.

See also:

> *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 159.

With such co-operative labor groups thus established as reasonable objects of imputed hazard, the New York Legislature proceeded to use such groups—not, like the Ohio Legislature, simply as objects themselves of compensation, but as the nucleus for a comprehensive group drawing into the compulsory compensation plan *all* employees of an employer who happens to employ four or more workmen or operatives. The result was second Group 45.

This extension of the law is revolutionary. If valid, it subjects to the compulsory compensation law practically every employer of any consequence in the state, because there are few employers with a dozen or more employees in their

service who do not have at least four among them engaged in some manual labor. If, therefore, 2nd Group 45 is valid under the Federal Constitution, all these employers—bankers, lawyers, brokers and innumerable others whose employees are commonly considered to be engaged in non-hazardous pursuits—must make provision under the compensation law for compensation to any and all employees in the event of injury. They must either maintain compensation insurance at heavy annual premiums, or else make deposits of securities with the State to guarantee payment of compensation benefits (Sec. 50).

The present case is an apt illustration of the unreasonable and unnecessarily burdensome nature of the obligation thus imposed. Among the 366 employees of the plaintiff-in-error, only a small number is engaged in manual labor and these are insured under the Compensation Law. Provision has been made under the law therefore for "all employees within its reason" *State* v. *Creamer*, 85 Ohio State, 349, 405.

What warrant can there be for compelling plaintiff-in-error to maintain also at heavy annual expense insurance for compensation to the much more numerous remainder of his employees for possible injuries which could be sustained—not in consequence of any hazard inherent in their occupations—but only through personal recklessness. In 20 years of operation by the plaintiff-in-error (fols. 31, 32) there have been but four accidents among employees and all these have been among the manual laborers who are covered by insurance. In these 20 years, there has never before been an accident among the other employees constituting the vast majority of the plaintiff-in-error's force.

It was not contended in the State Courts that the claimant in this case was a "workman or operative." It was conceded that he was neither (fols. 34, 50). It was not and could not be contended that he was in any way affected by the operations at 39 Park Place of the small group of "workmen or operatives" in the plaintiff-in-error's service. He and his fellow salesmen had no contact whatever with such groups. Only a very small number of plaintiff-in-error's employees did have contact with such groups. The injury which he suffered could not be deemed in the remotest degree to grow out of any operation by the manual workers. He and his fellow salesmen were as completely isolated and protected from any hazards created by the labors of the manual workers at 39 Park Place as if they had been stationed in the remotest corner of the state.

The occupation of the claimant himself and of the vast majority of his co-employees was conspicuously free from hazard. Several millions of the residents of the metropolitan district, making daily use of the subways and elevated railways incur the same hazards as the claimant in going to and from his place of work, and few are so completely sheltered from danger during their hours of work as he in his booth on the subway platform. His injury was the consequence not of any hazard inherent in his employment but of gross personal negligence and incredible folly that would have brought injury to any person in any occupation whatever. A lawyer's clerk, sent to answer a court calender and using the subway for transportation, would suffer like injury if he should lean over the platform without paying heed to approaching trains, and would have just as much reason for claim-

ing that the injury proved his occupation to be inherently hazardous. Any such contention would be absurd and no such contention has been made in the case.

The record presents, therefore, a case where the court, we believe, is now called upon to decide whether or not, in the language of Mr. Justice McKenna, it is "competent for Government to charge liability and exempt from responsibility according as one is employer or employee, there being no other circumstance than that relation." There is no basis in fact for imputing any hazard to the claimant's occupation, and heretofore hazard has been deemed to be an essential of any occupation subjected by virtue of the police power to the compulsory compensation law. The New York Legislature like the legislatures of other states, has recognized that "hazard" is essential, for the list of occupations subjected to the law is introduced, as above stated, with the words, "the following *hazardous* employments." A legislative declaration, however, is not conclusive (*Arizona Employers' Liability Cases, supra*, p. 450); and as appears above, there is in fact no hazard in the case. Hence, "it is now of pertinent inquiry whether the quality of being hazardous is an inherent and necessary element of legality or a matter of legislative definition and policy." (*Employers' Liability Cases, supra*, p. 437 bottom.) There could seem to be but one answer to the question. This court has repeatedly recognized in the cases above cited and in others that hazard is necessary to afford a basis for the exercise of the police power through such laws.

In *Munn* v. *Illinois*, 94 U. S. 113, the source and nature of this power was discussed and it

was pointed out that the power may be exercised in the regulation of private property and relations only when, through some inherent quality they become in the language of Lord Chief Justice Hale, "affected with a public interest." In private employments made subject to compulsory compensation laws, the quality that has been declared by legislatures and courts alike to clothe such employments with public interest and thus to justify intervention by the legislature has been that of inherent hazards of the employments, exposing employees, without regard to fault on either side, "to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him." (*Arizona Employers' Liability Cases*, *supra*, p. 428). Without the presence of such hazard in an employment, these features of public concern are lacking and this means, as was demonstrated in *Munn* v. *Illinois*, *supra*, that the necessary foundation for police regulation is lacking. The public morals and the public education are, of course, not involved here as in many police regulations. The Compensation Law must rest simply and solely for support upon the premise that the public is concerned in protecting workmen and their dependents from the consequences of accidental injuries suffered by reason of the hazardous nature of their occupations. Hence where there is no inherent hazard, there is no excuse for police interference through such laws. To hold otherwise would mean that there remains no barrier whatever to the enactment of laws compelling all employers, irrespective of the nature of their businesses, to make provision for compensation to their employees for injury or sickness or any other misfortune. Indeed it is

difficult to perceive any surviving obstacle to even more sweeping enactments,—to laws, for example, providing for compensation to any member of the public for injury or sickness or other disability, however incurred, and for the payment of such benefits through general taxation. If an employer may be compelled to make such provision for employees simply because of the bare relation of employer and employee, surely, by the same liberal process, the public may be compelled to make provision for individual members because of their common social and political bonds. If the police power is not to be kept in its traditional channels, there seems little to stay a flood of such communistic legislation. Confined to its time-honored channels, the police power has ample scope to confer all the benefits required by legitimate public interests or compatible with the spirit that has given distinction and power to our institutions. It should not be permitted to break over those bounds. For compulsory compensation laws, the limit is employments inherently hazardous. Second Group 45 of the New York Law passed beyond that limit, and has been applied in this case to an employment with no inherent hazard whatever. This is clearly a case, therefore, where there is "no reasonable basis for saying that the act is a proper exercise of the police power", and the act should according be declared unconstitutional and void.

Respectfully submitted,

HERMAN S. HERTWIG,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1921

No. 343

WARD & GOW,

Plaintiffs in Error,

against

HIMAN KRINSKY and STATE INDUSTRIAL COMMISSION

Defendants in Error,

BRIEF FOR STATE INDUSTRIAL COMMISSION, DEFENDANT IN ERROR

CHARLES D. NEWTON,
Attorney-General of the State of New York,
Capitol, Albany. N. Y.

E. CLARENCE AIKEN,
Deputy Attorney-General,
of Counsel for the State Industrial Commission,
Albany, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 343

WARD & GOW,
Plaintiffs in Error,
against
HIMAN KRINSKY and STATE INDUSTRIAL COMMISSION,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT.

STATEMENT OF THE CASE

This is a writ of error to review an order of the Court of Appeals of the State of New York, which unanimously affirmed an order of the Appellate Division, Third Department, which in turn unanimously affirmed an award of the State Industrial Commission made to the claimant, Himan Krinsky.

The employer is Mr. Artemas Ward, who does business under the name of Ward & Gow. He is the sole owner of the business, which consists of 125 news stands in the cities of New York and Brooklyn (fols. 9, 32). There were two divisions of the business — the sale of merchandise and the sale of advertising and display cards (fol. 32). In this business the employer employed 366

people (fol. 28), which may be listed somewhat as follows (fols. 29–32); 10 advertising soicitors, 20 artists, 5 bookkeepers, 10 stenographers, 32 office workers, 125 news stand salesmen, 14 news stand inspectors, 9 chauffeurs, 18 porters, 3 watchmen, 34 slot collectors, 4 weighing machine collectors, 6 carpenters, 17 bill posters and 28 men to place cards in the cars.

The Workmen's Compensation Law of the State of New York as originally enacted defined forty-two groups of employments as hazardous. Since the original enactment additional groups have been added and by chapter 634 of the Laws of 1918 group 45 was added, as follows:

> "All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants."

It was on account of this provison of the New York law that the claimant was awarded compensation. In the list of 366 employees there are many more than four that may be classed as workmen or operatives. For instance, 18 porters who unload trucks and trucking supplies (fol. 30), 3 watchmen (fol. 30), 6 carpenters (fol. 31), 17 bill posters (fol. 31), etc.

Another provision of the New York Workmen's Compensation Law defines "employee" as follows (§ 3, subd. 4):

> "'Employee' means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants."

This provision was in the law when this Court passed on its constitutionality in *New York Central R. R. Co.* v. *White*, 243 U. S. 188.

Inasmuch as the principal business of the employer was hazardous, the New York Courts have held that for that reason all of the employees of the employer were covered by the Compensation Law.

> *Mulford* v. *Pettit & Sons*, 220 N. Y. 540.
>
> *Dose* v. *Moehle Lithographic Co.*, 221 N. Y. 401.

and the opinion of Cochrane, J., in the Appellate Division in this case, printed in the transcript of record (fol. 50). No opinion was written in the Court of Appeals in this case but an opinion was written in a case argued and submitted at the same time, that of *Europe* v. *Addison Amusements, Inc.* (fols. 70–73).

The occupation of the employee was that of news agent (fol. 9). He had a place in a subway platform of the Mott Avenue station in the Bronx (fols. 14, 21), and had a booth 12 by 8 by 2½ feet. This booth was about 10 feet away from the edge of the subway platform (fol. 22). It was his duty to report at 7 o'clock in the morn-

ing and work till 6 o'clock in the evening, continuously (fols. 18, 22). He kept a bottle of water in order to wash and clean his stand (fols. 24, 25). He washed his hands in it sometimes so as to be able to sell candies and papers and when the water became dirty he emptied it on the track (fols. 18, 19, 20). The accident happened while he was emptying this bottle of water onto the subway track (fols. 18, 19). He was struck on the left side by a subway train (fols. 18, 19). This resulted in a fracture of the skull and laceration of the face, together with weakness in the right hand and arm (fol. 13).

ARGUMENT

Group 45 as construed by the courts of New York does not violate the provisions of the Federal Constitution guaranteeing due process and equal protection of the laws.

The Workmen's Compensation Law was passed pursuant to a Constitutional amendment adopted in 1913, which amendment commences as follows:

> "Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, etc."

The Workmen's Compensation Law passed pursuant to that amendment was challenged as

unconstitutional under the Federal Constitution and considered by this court in the case of *New York Central* v. *White*, 243 U. S. 188. That law was held to be constitutional in an extended opinion by Mr. Justice Pitney, not because the various employments enumerated were hazardous employments but upon the fundamental idea that the old law of master and servant was an inadequate remedy under modern conditions and that a law of compensation for all injuries received in any employment might be compensated by the master rather than compelling the servant to bring an action for negligence against his master. In other words, the old law of negligence was replaced by the new law of workmen's compensation. Mr. Justice Pitney in giving the opinion of the Court, says:

> "The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at

common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the law making power of the State; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

* * * * * * *

"It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall — that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon prov-

> ing facts of negigence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale."

In the case of *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, the law of the State of Washington was upheld, although in the Washington act employers were required to pay into a State fund from which employees who received accidental injuries were paid, so that an employer might be paying into a fund, although there might be no accidents happening in his business.

Prior to the decision of this court with reference to the Compensation Law of New York it had passed upon the law of the State of Ohio, which provided that "all employers who employ five or more workmen or operatives regularly in the same business or in and about the same establishment, who shall not pay into the State insurance fund the premiums provided by this act, shall be liable to their employees for damages," etc. It is said by Mr. Justice Day in construing this law, 235 U. S. 571:

> "This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five and more persons and which voluntarily take advantage of the law. Those remaining out and who might come in because of the number employed are deprived of certain defenses which a law might abolish as to all if it was seen fit to do so, and it was

> held that the classification was not of that arbitrary and unreasonable nature which would justify a court in declaring the legislation unconstitutional."

It may well be argued and we do contend that there is more danger of accident where men are grouped together in numbers, not only from machinery which is operated but from assaults or altercations among themselves in reference to their work. This is well illustrated in the working of the Compensation Law of the State of New York as shown by the following list of cases in the Court of Appeals in which the accident has been due to an assault or altercation between workmen.

Heitz v. *Rupert*, 218 N. Y. 148.
Carbone v. *Loft*, 219 N. Y. 579.
Sassano v. *Paino*, 226 N. Y. 699.
Verschleiser v. *Stern & Sons*, 229 N. Y. 192.
Knocks v. *Metal Packing Corp.*, 231 N. Y. 78.

In addition to the cases above cited there are also a very large number of cases decided by the Appellate Division of the Supreme Court in which appeals have not been taken to the Court of Appeals.

The case of *Europe* v. *Addison Amusements, Inc.*, 231 N. Y. 105, the opinion in which case is printed in the record here (fols. 70-73), was a case where the death of the deceased employee was due to being killed by a co-employee who was angered and bore a grudge against Mr. Europe, the leader of the band.

We find the same danger from assault and altercation in reports of other States.

> *Pekin Cooperage Co.* v. *Industrial Com.*, 285 Ill. 30, 31.
> *Swift & Co.* v. *Industrial Com.*, 287 Ill. 564.
> *McIntyre* v. *Rodger & Co.*, 41 Scott L. Rep. 107.

The appellants argue that while the four or more workmen or operatives might be brought under the law it is not proper to cover the other employees who are not working. It would, however, be confusing in the administration of the law to provide only for the four or more workmen alone, and the danger of accident where there are four or more workmen will in most cases be the same for the other employees as for the workmen. The New York State Compensation Law provides for insurance by an employer of its employees, and if he comes under the law the insurance policy covers all its employees.

In the case of *Lower Vein Coal Co.* v. *Industrial Board of Indiana*, 255 U. S. 144, there was under consideration an amendment to the Compensation Law of Indiana, made in 1919, by which the act was made mandatory as to all coal mining companies of the State and permissive as to all other employees. It was held that the Legislature had the power of classification which it considered necessary for the public welfare. Mr. Justice McKenna says:

> "The Coal Company further contends that the law includes within its terms all the company's employees whether engaged in

the hazardous part of its business or not so engaged. In other words, it asserts that the conditions of those who work underground may justify the law but do not justify its application to those who work above ground. The contention has a certain speciousness but cannot be entertained. It commits the law and its application to distinctions that might be very confusing in its administration and subjects it and the controversies that may arise under it to various tests of facts and this against the same company. The contention is answered in effect by *Booth* v. *State of Indiana,* 237 U. S. 391, 35 Sup. Ct. 617, 59 L. ed. 1011."

And again at page 151:

"The contention only has strength by regarding employers' liability acts and workmen's compensation acts as practically identical in the public policy respectively involved in them and in effect upon employer and employee. This we think is without foundation. They both provide for reparation of injuries to employees but differ in manner and effect, and there is something more in a compensation law than the *element of hazard,* something that gives room for the power of classification which a legislature may exercise in its judgment of what is necessary for the public welfare, to which we have adverted, and which cannot be pronounced arbitrary because it may be disputed and 'opposed by argument and opinion of serious strength.'"

We also cite the Arizona Employers' Liability Cases, 250 U. S. 400, 419, to the effect as therein stated:

"that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course

> of the employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change."

We further contend that all employments are more or less hazardous and it is only a question of the degree of hazard. That principle was recognized in the Arizona Employers' Liability Cases just cited.

Practically all employees in Great Britain are covered by the law, there being no distinction between hazardous and non-hazardous employments.

The large number of accidents which have come to light in the enforcement of the law aptly illustrates how near we all are to death or injury and we may well quote Robert Louis Stevenson's essay Aes **Triplex**:

> "We have all heard of cities in South America built upon the side of fiery mountains, and how, even in this tremendous neighborhood, the inhabitants are not a jot more impressed by the solemnity of mortal conditions than if they were delving gardens in the greenest corner of England. There are serenades and suppers and much gallantry among the myrtles overhead; and meanwhile the foundation shudders under-foot, the bowels of the mountain growl, and at any

moment living ruin may leap sky-high into the moonlight, and tumble man and his merry-making in the dust. In the eyes of very young people and very dull old ones, there is something indescribably reckless and desperate in such a picture. It seems not credible that respectable married people, with umbrellas, should find appetite for a bit of supper within quite a long distance of a fiery mountain; ordinary life begins to smell of high-handed debauch when it is carred on so close to a catastrophe; and even cheese and salad, it seems, could hardly be relished in such circumstances without something like a defiance of the Creator. It should be a place for nobody but hermits dwelling in prayer and maceration, or mere born-devils drowning care in a perpetual carouse.

"And yet, when one comes to think upon it calmly, the situation of these South American citizens forms only a very pale figure for the state of ordinary mankind. This world itself — travelling blindly and swiftly in overcrowded space among a million other worlds travelling blindly and swiftly in contrary directions, may very well come by a knock that would set it into explosion like a penny squib. And what, pathologically looked at, is the human body with all its organs, but a mere bagful of petards? The least of these is as dangerous to the whole economy as the ship's powder-magazine to the ship; and with every breath we breathe, and every meal we eat, we are putting one or more of them in peril. If we clung as devotedly as some philosophers pretend we do to the abstract idea of life, or were half as frightened as they make out we are, for the subversive accident that ends it all, the trumpets might

sound by the hour and no one would follow them into battle — the blue-peter might fly at the truck, but who would climb into a sea-going ship. Think (if these philosophers were right) with what a preparation of spirit we should affront the daily peril of the dinner-table; a deadlier spot than any battle-field in history, where the far greater proportion of our ancestors have miserably left their bones! What woman would ever be lured into marriage, so much more dangerous than the wildest sea? And what would it be to grow old? For, after a certain distance, every step we take in life we find the ice growing thinner below our feet, and all around us and behind us we see our contemporaries going through. By the time a man gets well into the seventies, his continued existence is a mere miracle; and when he lays his old bones in bed for the night, there is an overwhelming probability that he will never see the day. * * *

Perhaps the reader remembers one of the humorous devices of the deified Caligula; how he encouraged a vast concourse of holiday-makers on to his bridge over Baiae bay; and when they were in the height of their enjoyment, turned loose the Praetorian guards among the company, and had them tossed into the sea. This is no bad miniature of the dealings of nature with the transitory race of man. Only, what a chequered picnic we have of it, even while it lasts! And into what great waters, not to be crossed by any swimmer, God's pale Praetorian throws us over in the end!

We live the time that a match flickers; we pop the cork of the ginger-beer bottle, and the earthquake swallows us on the instant. Is it not odd, is it not incongruous, is it not,

> in the highest sense of human speech, incredible, that we should think so highly of the ginger-beer, and regard so little the devouring earthquake?''

Stevenson's essay is applicable to New York city more than any other place in this country. It must be kept in mind that the employment of this claimant was in a public place where the subway trains were whizzing by and crowds of people getting off and on these trains. The accident in question shows that there was hazard in the employment and one of the business managers testified to there being a porter killed eight or nine months before besides minor accidents within two or three years (fol. 32). Accidents at subway stations have been reported in the newspapers where, on account of accidents to trains, the lights have gone out and passengers have rushed from the trains at subway stations.

When we consider the unexplained murders which have occurred in New York, something over three hundred in two years, and the countless holdups that are a feature every day in the newspapers, so open and brazen that in one case three men held up forty patrons of one of Child's restaurants, we must consider New York city a dangerous place. On one day in October a mail wagon in lower New York was held up and robbed of a million and a half of securities.

Among the active licensed chauffeurs in 1921, there are 157 who have had their little adventures with justice, 90 having pleaded guilty to petty larceny, although in many cases the charge of burglary in the first or second degree was softened to the more diminutive offense. In this

Bagdad of adventure the driver with an erroneous past is surely better fitted than the innocent to force his cab "through the press of the wicked and to avoid the devices of Satan." One police captain reported on October 6, 1921, 432 out of 5,439 applicants for taxicab licenses had finger-print records; that 46 arrests were made of holders of taxicab licenses for different crimes. They have such things also on a larger scale, as the Wall street explosion which killed many people on the street.

To a large extent the nature of accidents to which men are subject depends upon their environment. If we live in the jungle, we may expect such accidents as the spring of the tiger and the bite of the serpent. If we live on the side of the volcano, it may be quiescent for years, but yet again may break out in showers of stone and gases or in fiery floods of lava. If we live in an earthquake country, we are constantly liable to shocks which may be only sufficient to disturb our equilibrium or strong enough to cause a fall of the building in which we are dwelling, while if we live in New York city we are liable to be knocked down by automobiles in the street or to be sandbagged or blown to pieces by the tigers of society.

New York city is the Bagdad of modern times. One thousand and one nights of adventure might there find place in a modern Arabian Nights. The pace set by this city cannot be surpassed. The motto is "step lively" and "watch your step." The Great White Way sparkles with scintillating jewelled lights advertising "Wrigley's Chewing Gum" and many other luxuries

not known in Bagdad of old. The buildings rise to more tremendous heights, the foundations sink deeper, the girls at the Hippodrome jump higher, dive deeper and come up drier than in any other city in the world. In this new Bagdad any accident is possible.

Respectfully submitted,

E. CLARENCE AIKEN,

Of Counsel.

the Circuit Court of Appeals is

Affirmed.

WARD & GOW *v.* KRINSKY ET AL.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

No. 343. Argued December 14, 1921.—Decided June 5, 1922.

1. The rights of employers under the Fourteenth Amendment are not violated by an extension of the New York Compensation Act (see *New York Central R. R. Co.* v. *White*, 243 U. S. 188) to all employments in which four or more workmen or operatives (farm laborers and domestic servants excepted) are regularly employed, construed by the state court as including, also, all other employees of the same employer and employed in the same business with such workmen and operatives, though at places remote from their work. Pp. 510, 513, 516.
2. So *held* of an employer in the business of disposing of advertising space on the cars and station platforms of subway and elevated railway lines in a city, and of selling newspapers, etc., at booths located on the platforms; with numerous employees, including executives, clerks, inspectors, chauffeurs and porters; and many salesmen working in the booths separately and apart from other employees; and where the injury in question was inflicted upon such a salesman by a subway train while he was engaged in emptying from the platform upon the tracks a pail of water, used in connection with his work in his booth. P. 507.

193 App. Div. 557; 231 N. Y. 525, affirmed.

ERROR to a judgment of the Supreme Court of New York, Appellate Division, entered upon remittitur from the Court of Appeals, and affirming an award of compensation made by the New York Compensation Commission in favor of the defendant in error Krinsky.

Mr. Herman S. Hertwig for plaintiff in error.

A classification of occupations as hazardous must bear reasonable relation to the facts.

Down to the present time, it has been expressly recognized, by both courts and legislatures, that hazard must in fact exist in an occupation to afford a basis for the exercise of the police power through compensation legislation. By hazard is meant inherent dangers, greater than those existing in the innumerable occupations commonly regarded as non-hazardous. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Arizona Employers' Liability Cases*, 250 U. S. 400.

The compensation plan was put into operation in New York first over certain conspicuously hazardous occupations like mining, railway operations, etc., described in forty-two groups. After the validity of the law was upheld in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, in regard to such obviously hazardous employments, it was next extended by Laws 1916, c. 622, to embrace every employee whose employer was prosecuting one of the hazardous operations as his principal business, whether the occupation of the employee himself was hazardous or non-hazardous. This extension was founded apparently on the theory that where the principal business is hazardous, the legislature may reasonably assume that all employees are in some manner affected by the hazard of the principal operation. The validity of it under the Constitution, so far as we can discover, has not been considered, either in the state courts or in this court. It may well be seriously questioned.

The New York Legislature took as a point of departure in its next enlargement of the scope of the law a provision of the Ohio Workmen's Compensation Law characterizing as inherently hazardous the work of manual laborers in groups of five or more. Gen. Code Ohio, §§ 1465–60, upheld in *State* v. *Creamer*, 85 Oh. St. 349; and again in *Jeffrey* v. *Blagg*, 90 Oh. St. 376, affirmed, 235 U. S. 571. The basis for the holding seems to have been that the mere association of manual workers in group labor neces-

sarily renders their work hazardous by reason of the concurrence in such group labor of so many imperfect human factors. *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 159.

With such coöperative labor groups thus established as reasonable objects of imputed hazard, the New York Legislature proceeded to use such groups—not, like the Ohio Legislature, simply as objects themselves of compensation, but as the nucleus for a comprehensive group, drawing into the compulsory compensation plan all employees of an employer who happens to employ four or more workmen or operatives. The result was second Group 45.

This extension of the law is revolutionary. If valid, it subjects to the compulsory compensation law practically every employer of any consequence in the State, because there are few employers with a dozen or more employees in their service who do not have at least four among them engaged in some manual labor. They must either maintain compensation insurance for all, at heavy annual premiums, or else make deposits of securities with the State to guarantee payment of compensation benefits.

In twenty years of operation by the plaintiff in error, there have been but four accidents among employees, and all these have been among the manual laborers who are covered by insurance. In these twenty years, there has never before been an accident among the other employees constituting the vast majority of the plaintiff in error's force.

The occupation of the claimant himself and of the vast majority of his co-employees was conspicuously free from hazard. His injury was the consequence, not of any hazard inherent in his employment, but of gross personal negligence and incredible folly that would have brought injury to any person in any occupation whatever.

In private employments, made subject to compulsory compensation laws, the quality that has been declared by

legislatures and courts alike to clothe such employments with public interest, and thus to justify intervention by the legislature, has been that of inherent hazards of the employments, exposing employees, without regard to fault on either side, to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him. *Arizona Employers' Liability Cases*, 250 U. S. 400, 428. Without the presence of such hazard in an employment, these features of public concern are lacking, and this means, as was demonstrated in *Munn* v. *Illinois*, 94 U. S. 113, that the necessary foundation for police regulation is lacking.

Mr. E. Clarence Aiken, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, was on the brief, for the State Industrial Commission, defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The New York Workmen's Compensation Law of 1913–1914 [Laws 1913, c. 816; Laws 1914 cc. 41 and 316] sustained as constitutional against attacks based on the due process and equal protection clauses of the Fourteenth Amendment in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, after several amendments was further amended by c. 634 of the Laws of 1918, which added to the list of hazardous employments in § 2 a new sub-division or group, as group 45—the second to be so designated—reading as follows: " Group 45. All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire,

express or implied, oral or written, except farm laborers and domestic servants."

The present writ of error raises the question whether the Compensation Law, as thus extended, if construed and applied so as to impose upon plaintiff in error a liability for compensation in the case of defendant in error Himan Krinsky, is in contravention of either of the cited constitutional provisions.

The singularity of the facts makes a somewhat particular statement necessary to a clear understanding of the argument. Plaintiff in error, Artemas Ward, under the name of Ward & Gow, leases from the Interborough Rapid Transit Company advertising and vending privileges upon various subway and elevated railway lines in the City of New York, and carries on the business of disposing of advertising space in the cars and on station platforms, and selling periodicals and various articles of merchandise in booths located upon the platforms. In the latter department, which alone requires mention, there are 307 employees, including executives, office workers, news stand inspectors who travel singly over the different elevated and subway lines to inspect displays and see that the sales booths are properly kept, chauffeurs who drive trucks transporting merchandise from headquarters downtown in Manhattan to the different subway and elevated stations, 18 porters for loading and unloading the trucks at headquarters, and various others, among them 125 news stand salesmen, each of whom is stationed at a booth in a subway or elevated railway station, and whose work is separate from that of other employees. Each of them goes directly to his stand in the morning and thence to his home in the evening, and his duties consist of keeping a display of papers, magazines, candies, and other small articles in proper order, selling them across the counter, keeping an account of sales and turning in the collections. The only other employees with whom a salesman comes in contact

are the inspector, and the chauffeur who brings supplies from the truck, either down to the subway or up to the elevated platform, and passes them across the counter to the salesman.

Krinsky was one of these salesmen, stationed in a booth at a subway station in the Bronx. The booth was a steel structure 12 feet long, 8 feet wide or high, 2½ feet deep, located against a wall 10 feet from the edge of the platform. In order to keep the booth and its contents free from dust, and his hands in a proper condition of cleanliness, water was kept for convenience in the booth, in a pail furnished by the employer, to be emptied by Krinsky when necessary, and replenished with water obtained from a washroom two flights of stairs above the train level. He was in the habit of emptying the water in the morning upon the tracks of the subway and replenishing the supply before starting business. One morning in February, 1919, while thus emptying the water as usual, Krinsky was struck upon the side of the head by an approaching train, his skull was fractured and he sustained disabling personal injuries which the Industrial Commission found were accidental and arose out of and in the course of the employment.

An award of compensation made by the commission was affirmed by the Appellate Division of the Supreme Court (193 App. Div. 557), and its judgment was affirmed without opinion by the Court of Appeals. The record was remitted to the Appellate Division, which made the order and judgment of the Court of Appeals its own, and to it as custodian of the record the present writ of error was directed.

It was not disputed in the state courts, nor is it questioned here, that in the merchandising department of plaintiff in error there were more than four "workmen or operatives" within the meaning of second group 45 of § 2 of the Compensation Law. Evidently the porters were

such, and clearly were "engaged in the same business" with the salesmen, for they loaded the trucks which carried the merchandise from the central depot to the booths. The Appellate Division held that the salesmen, although not "workmen or operatives", nevertheless were within the protection of the statute. Reference was made to the definition of "employee" in subdivision 4 of § 3, amended by Laws 1916, c. 622, and Laws 1917, c. 705, so as to include anyone in the service of an employer whose principal business is that of conducting a hazardous employment, construed in previous decisions as bringing within the protection of the statute all employees accidentally injured in the performance of duties incidental to the prosecution of a business defined as hazardous, even though such duties were not a part of the characteristic process or operation forming the basis of the group (*Matter of Dose* v. *Moehle Lithographic Co.*, 221 N. Y. 401, 405; *Spang* v. *Broadway Brewing & Malting Co.*, 182 App. Div. 443; *Joyce* v. *Eastman Kodak Co., id.*, 354); and it was held that since this rule applied to all the other groups defined in § 2, it must be applied in respect to second group 45. That the view of the Court of Appeals was substantially the same, appears not only from its affirming the judgment of the Appellate Division without questioning its reasoning, but from the opinion delivered by the Court of Appeals itself in a case decided at the same time with this, *Europe* v. *Addison Amusements, Inc.*, 231 N. Y. 105. Europe was conductor of a famous band of musicians who, after a military service with the American Forces in France, went upon a concert tour throughout the United States, under employment by Addison Amusements, Inc. With the band of sixty-five pieces there were four or more workmen or operatives employed to accompany it, arrange platforms, chairs and scenery, handle baggage, etc. Europe himself, although an employee was not among those described as "work-

men or operatives," nor engaged in hazardous work, ordinarily so-called. During an intermission in the program of a concert he was stabbed and killed by a drummer of the band. The Court of Appeals, sustaining the Industrial Commission and the Appellate Division, held that he was within the protection of second group 45.

In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence for present purposes it must be taken as settled that the legislature intended the compensation law as amended to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon state action.

Under the due process of law clause, plaintiff in error contends that the validity of compulsory workmen's compensation acts depends upon the inherently hazardous character of the occupations covered; that a legislative declaration that a certain employment is hazardous is not conclusive; and that to impose upon the employer, as is said to be done in this instance, a liability to make compensation to any employee out of hundreds whose occupations are non-hazardous, because four or more workmen or operatives may happen to be regularly employed in the same business, or in or about the same establishment, although not brought into contact with the injured employee, and where, to use the words of counsel, "his injury was the consequence not of any hazard inherent in his employment, but of gross personal negligence, or incredible folly that would have brought injury to any person in any occupation whatever," is so altogether unreasonable as to be wanting in due process. The argument rests upon the curious misconception that the legislature

regarded the workmen or operatives as the sole source of danger to those engaged in the same business with them; and upon the assumption, equally untenable, that the occupation of a salesman at a subway station, protected ordinarily by the comparative security of a steel booth but called upon at times, in the line of duty, to go into the moving throngs of passengers and into close proximity to the rails upon which locomotives and trains are moving, is free from inherent hazard to the salesman.

That Krinsky's injuries arose out of and in the course of his employment was found by the commission, whose findings and decision were affirmed by both courts, and must be conclusive upon us unless ascertained to be without support in the evidence, including any reasonable inference that may be drawn from it.

As has been seen, he was charged with the sale of a stock of merchandise belonging to the employer, and for this purpose was stationed in a booth placed upon the platform of a subway station, about ten feet from the tracks. There was evidence showing that he had sole responsibility for the care and display of this merchandise, which, of course, he was to sell to the passing throngs of train passengers, and was required to keep the booth, the stock, and his own person in a cleanly condition. The employer supplied a container for water to be used for the latter purpose, and naturally this was kept in the booth, emptied and replenished by Krinsky as occasion required. He was not instructed how this should be done, and the state commission and courts reasonably might infer that he was at liberty to do it in the most convenient and expeditious mode. To say, as is suggested, that he was constrained to close and lock the booth, leave it and go up two flights, either by elevator or staircase, in order to empty the water, with consequent interruption of business in the meantime (thirty minutes, according to the evidence), when the same object could be accomplished

in a few moments and without closing the booth by stepping ten feet across the platform to the edge of the track and there emptying the water, relying upon a volunteer assistant to bring a fresh supply, would be to place a strained and unreasonable construction upon the scope of implied duties. True, he might have avoided the particular hazard that overtook him, had he chosen the tedious journey two flights up and down again, instead of the half-dozen steps across the platform to the edge of the track. Whether, in the hurry and bustle of a subway crowd, the nature of Krinsky's duties required or permitted him to follow the slower course, or even that it involved less probability of personal injury than the one habitually adopted, are questions upon which the commission and the state courts are peculiarly fitted to draw correct inferences. Certainly, we are not warranted in holding that the findings are without support in the evidence.

A sufficient vindication of compulsory Workmen's Compensation and Employers' Liability Acts, as it has seemed to this court, is found in the public interest of the State in the lives and personal security of those who are under the protection of its laws; from which it follows that, when men are employed in hazardous occupations for gain, it is within the power of the State to charge the pecuniary losses arising from disabling or fatal personal injury, to some extent at least, against the industry after the manner of casualty insurance, instead of allowing them to rest where they may happen to fall—upon the particular injured employees or their dependents; and to this end to require that the employer—he who organizes and directs the enterprise, hires the workmen, fixes the wages, sets a price upon the product, receives the gross proceeds, pays the costs and the losses and takes for his reward the net profits, if any—shall make or secure to be made such compensation as reasonably may be prescribed, to be paid in

the event of the injury or death of one of those employed, instead of permitting the entire risk to be assumed by the individuals immediately affected. In general, as in the New York law, provisions for compulsory compensation are made to apply only to those employed in hazardous occupations, where it may be contemplated by both parties in advance that sooner or later some of those employed probably will sustain accidental injury in the course of the employment, but where nobody can know in advance which particular employees or how many will be the victims, or how serious will be the injuries. *New York Central R. R. Co.* v. *White,* 243 U. S. 188, 202, *et seq.; Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 239, 243–244; *Arizona Employers' Liability Cases,* 250 U. S 400, 420, 422–426.

That there was inherent hazard in Krinsky's occupation is conclusively shown by the fact that in the course of it he received a serious and disabling personal injury arising out of it. That the event might have been foreseen is demonstrated by the way in which it occurred, not to speak of the fact that the legislature actually foresaw it and made provision for it, long before it occurred. Hence there was no undue deprivation of the liberty or property of plaintiff in error, or his right to acquire property in lawful business, in the act of the legislature which required him to take warning and make provision against the event which afterwards in fact occurred.

It will be seen that while, by the terms of the statute, the employment of "four or more workmen or operatives regularly, in the same business or in or about the same establishment," etc., apparently is indicated as the basis of the new group—one rather frequently adopted in laws of this character, *Jeffrey Manufacturing Co.* v. *Blagg,* 235 U. S. 571, 574, etc.; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 159;—in effect, by the construction adopted by the state court and binding upon us, the em-

ployees brought within the compensation features of the act include not only the "four or more workmen or operatives", or others injured through contact with them, but any and all other employees in the same business who may suffer accidental and disabling injury arising out of and in the course of their employment, although due to incidental hazards not typical of the group.

The contention that by this construction second group 45 has been extended beyond the limit allowable consistently with due process of law and "has been applied in this case to an employment with no inherent hazard whatever," rests upon an assumption of fact disproved by Krinsky's experience. Were it not so, the argument is self-destructive. The statute requires the employer to make or secure compensation for the disability or death of an employee only where it results from accidental personal injury arising out of and in the course of the employment. Where the employment is entirely free from inherent hazard to the employee, the statute imposes no responsibility upon the employer, hence cannot substantially interfere with his liberty or property, with or without "due process of law." *Arizona Employers' Liability Cases*, 250 U. S. 400, 429.

Reducing the argument by omitting the extravagant statement that so plainly leads to absurdity, it may be outlined thus: that Krinsky's occupation was no more hazardous than that of millions of residents of the metropolitan district who daily make use of the subways and elevated railways in going to and from their work; that there had been no such accident among plaintiff in error's employees in 20 years of operation; and that it is unreasonably and unnecessarily burdensome to require the employer to either maintain compensation insurance at heavy annual premiums, or deposit securities with the State to guarantee payment of compensation benefits, where the probability of injury is so slight. The answer is

easy: To the self-insurer no liability accrues except as disabling injuries actually occur; the giving of security, a reasonable regulation in aid of the general scheme (*New York Central R. R. Co.* v. *White*, 243 U. S. 188, 208–209), does not increase the obligation. To the employer who insures, presumably the premiums will not exceed a reasonable estimate of the risk; to him who insures in the state fund, there is an assurance of equivalency in the public administration of the fund under § 90, *et seq.*, of the law, especially the duty imposed upon the state board by § 95 to keep separate accounts as to each group so as to determine equitable rates, to rearrange the groups by withdrawing any employment embraced in one group and transferring it wholly or in part to another, to set up new groups at discretion, to determine the hazards of the different classes composing each group and to fix the premiums therefor, based upon the total pay-roll and number of employees in each class of employment, at the lowest possible rate consistent with the maintenance of a solvent insurance fund and the creation of a reasonable surplus and reserve. A similar system was sustained in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 241–243.

The fallacy of the argument for holding it arbitrary and unreasonable to impose upon the employer the burden of making compensation in employments where injury is improbable and difficult to be foreseen, should be fairly apparent when it is pointed out that, in the absence of the statute, not a part but the entire loss consequent upon a disabling or fatal injury arising out of and in the course of the employment would have to be assumed and borne by the disabled employee or his dependents, just as under the statute they still must bear all beyond the scheduled compensation. Yet they have no better opportunity to foresee the casualty than the employer, and (in the judgment of the legislature) less opportunity to make pro-

vision against it. The common-law rule, requiring the employee to assume the risk, and to take account of it in advance when fixing the wages, recognized dimly that the cost of industrial accidents ought to be borne by the industry, but failed to effectuate such a purpose, partly for the very reason that the hazard could not be estimated by the individual in advance, nor the loss provided against without coöperation.

The extension of the Compensation Law by addition of second group 45, following the recent modification of the definition of "employee," far from demonstrating in its application to Krinsky's case unreasonable, arbitrary action by the State through its legislative department, shows, rather, intelligent foresight, an anticipation, based upon practical experience in the operation of the law as it stood before, that, however little foreseen by persons immediately concerned, accidental disabling injuries inevitably would occur in occupations not previously classed as hazardous, and a reasonable determination to include them in a scheme already found to be free from constitutional objection in its general application.

We have sufficiently indicated grounds for holding that the statute as thus extended is not repugnant to the guaranty of "due process of law" in the Fourteenth Amendment.

That it does not deny to plaintiff in error "the equal protection of the laws," is equally clear. The argument that it does proceeds upon the untenable theory that if hazard be imputed to the employment of "four or more workmen or operatives regularly, in the same business or in or about the same establishment," its effect in the scheme of compensation must be confined to the hazards attributable to group labor. In *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 575; and *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 159, a somewhat similar classification was sustained, but not upon any limited

ground. In the framing of so far-reaching a scheme of legislation, dealing with occupations so diverse, necessarily a wide range must be accorded to legislative discretion about defining the groups to which it shall apply. Lines must be drawn, and it is not to be assumed that they have been drawn without good reason. The difference between the larger and the smaller establishments may be recognized as a basis of classification in legislation affecting the defenses of contributory negligence and assumption of risk, as was held in *Jeffrey Manufacturing Co.* v. *Blagg, supra.* So, the minimum number in a single employ may be regarded, we think, in arranging a system designed to distribute the burden of industrial accident losses with a view to the ability of the industry to bear it. Nor need a law framed on the lines of that under consideration confine the compensation narrowly to typical cases, where it is confined, as here, to cases actually arising in the course of gainful employment, and due to inherent hazards of the occupation. Second group 45 applies impartially to all employers who come within the descriptive terms; the employment of "four or more workmen or operatives regularly" is treated as the nucleus of a business probably involving personal hazard to some of those employed; and the same rule of construction is applied to this as to other groups.

But, it is insisted, neither *stare decisis* nor *ita lex scripta est* furnishes an adequate reply to a constitutional objection. This court sustained the New York Workmen's Compensation Law, and the kindred statutes of Washington and Arizona, fundamentally upon the ground of the hazardous nature of the occupations covered. If that ground is defensible at all—so runs the argument—the system must be confined to occupations actually hazardous in their nature; a legislative definition is not sufficient, nor is the occurrence of a single accident, much less one so singular and so little related to his general duty as that

which befell Krinsky, adequate proof of occupational hazard. It might occur to anybody, any day, on his way downtown to business, were he not especially careful. This is too fantastic a definition of "inherent risk" to form a basis of a law which must conform to standards of reasonableness. And again, how can the classification resorted to in second group 45 be sustained as reasonable, within the requirements either of the "due process of law" or the "equal protection of the laws" provisions of the Fourteenth Amendment? The occupation of a salesman stationed alone far uptown in the Bronx does not become hazardous simply because four or more porters are regularly employed at headquarters downtown in Manhattan. How can we accept the reason suggested by the Court of Appeals in the *Europe Case, supra,* (somewhat at random, it should be said, and when the court, by its own confession, was not required to test its adequacy), "that a business not ordinarily hazardous becomes such at times when manual work is done or machinery operated in connection with its main purpose"? This would be an assumption contrary to common experience—especially as applied to manual work downtown in Manhattan and the occupation of a single salesman—it might as well have been 500 clerks—uptown in the Bronx. What reason is there for imposing compulsory liability upon the employer of salesmen or clerks in the Bronx simply because he finds it convenient to employ at the same time, but in separate duties, four workmen or operatives in Manhattan? He might dismiss the workmen—his neighbor and business competitor might dispense with such workmen—and thus gain immunity from the statute. Classification is permissible in legislation only when based on reasonable grounds. This peculiar grouping is classification gone wild. It cannot be sustained by the simple and obvious tests applied in *Jeffrey Manufacturing Co.* v. *Blagg, supra,* and kindred cases.

This, we believe, is a fair summary of the reasoning expressed or suggested in the brief and in the oral argument of plaintiff in error. We have not minimized its force, and concede that, if it is to be taken seriously, it seems to subject second group 45, and the Compensation Law as extended by this and other recent amendments, to a test that ought to be responded to satisfactorily if the validity of the statute is to be made clear.

Many of the propositions may be admitted—for the purpose of the argument only—as correct according to *a priori* standards, and unanswerable without resort to the tests of experience. We shall endeavor, with some care, to answer from the latter standpoint, not contenting ourselves with some rather too obvious replies already suggested.

The New York Workmen's Compensation Law by its terms is based upon the existence of actual, not hypothetical, inherent hazards confronting employees in gainful occupations; was sustained as valid by this court upon that ground in *New York Central R. R. Co.* v. *White, supra;* has been administered by the State constantly on that basis; and second group 45 shows no clear evidence of a purpose to depart from it. We leave wholly aside, as not here involved, the question whether the new group could be sustained on any other basis. Any question about the validity of an act purporting to impose compulsory liability upon employers for losses due to occupational hazards where there really are no occupational hazards, may safely be left until such a case is presented.

Next, we agree that, in a test of constitutionality under the Fourteenth Amendment, the question whether there is inherent hazard in an occupation or a group of occupations is not to be settled conclusively by a legislative declaration or by an empty form of words. We add, it is not to be settled, hardly is affected, by an arbitrary *a priori* statement, unaided by the light of experience in

which the legislature acted, that there is *absolutely no* inherent hazard in an occupation, especially where it appears that even one employee has been seriously injured while acting in the line of his duties in a manner that easily might have been anticipated by the employer, or the inspector who supervised his work, to say nothing of the employee himself, had either of these exercised the ordinary care of the reasonably prudent man to whom the common law so frequently resorts for a standard. The legislature, in the New York system, is justified in extending the benefits of the Compensation Law as far as it reasonably may determine occupational hazard to extend —to the "vanishing point" as it were—and any lines of group definition it may adopt, if easily understood and applied, cannot reasonably be called "an empty form of words" merely because they do not carry on their face the reasons for adopting them.

Again, we agree that (if it were necessary, as we hold it is not, that group lines should explain themselves), the suggestion quoted from the opinion of the Court of Appeals in the *Europe Case* hardly offers a satisfactory explanation of the new group, reasonably definite and substantial in its basis, within the tests of the Fourteenth Amendment. But this court, while bound by the *construction* of the statute adopted by the state court of last resort—that being a question of state law—is not concluded by its *reasoning* but must exercise an independent judgment, when called upon to determine the federal question whether the act as construed and applied, is repugnant to the restrictions of the Amendment. Any suggestion from the state court *in aid of* the act fairly may be accepted; but a suggestion having an adverse effect, while entitled to respectful consideration, is not to be taken as weakening the action taken by the State through its legislative branch, or as furnishing an *exclusive* statement of the grounds upon which the legislature acted. It

is proper to say that in the *Europe Case* no question of the constitutionality of the new group 45 appears to have been presented, and the court alluded to the phraseology merely to dispose of the question of construction.

In examining the Compensation Law and its many amendments, including the one in question, and the workings of the law as indicated by the decisions cited and others, we have been impressed again and again, to the point of complete conviction, that this act or any of its amendments is not the work of novices or bunglers. *A priori* reasoning has not been resorted to; there is no reliance upon generalizations or "common knowledge"; no "simply because"; nothing taken for granted. No case that we recall illustrates more aptly or forcibly the wisdom of the familiar rule, expressed by this court in a recent case in these terms: "There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds." *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157. The law was passed in 1913 and reënacted in 1914 after the taking effect of a constitutional amendment adopted under circumstances mentioned in the *White Case*, 243 U. S. 188, 195; the decision of this court was announced in March, 1917; meanwhile, administration commenced July 1, 1914, and was continued for four years prior to the enactment of second group 45; a multitude of compensation rulings, opinions of the Attorney General, and court decisions, sufficiently reported to the public, together with the administration of the state insurance fund, and a study and adoption of the plan of classifications used by private casualty insurance companies for underwriting business, may give but an inadequate impression of the informed, expert opinion upon which the legislature might, and we fairly may presume did, draw for aid in framing the new group.

What was it they were aiming at, and how did they seek to accomplish it? We need not be sure of hitting upon a correct, much less a complete, explanation. Upon the general presumption referred to the questioned group must stand, unless it were demonstrated to a moral certainty, beyond a reasonable doubt, that the grouping could not possibly be explained on reasonable grounds.

Let us assume that after four years' practical experience in the operation of the Compensation Law, aided by the intensive studies of the Commission, the legislature was satisfied with the law as well suited to the needs of the people, except that it did not go far enough and left uncovered much unclassified ground where undefined and virtually undefinable industrial hazards remained. It was desired to leave out, as before, farm laborers and domestic servants; a classification sustained upon simple grounds, doubtless far from expressing in full the reasons that had actuated the legislature, in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 208.

Aside from this, let us suppose it was desired to extend the benefits of the law as far as practicable from the administrative standpoint; abandon the attempt to go further in grouping occupations as hazardous because of the names by which they are described, include all remaining businesses, above a fixed minimum, in a single group, treat them all as more or less hazardous, and leave questions as to the particular degree of hazard, and the proper grouping of businesses as between themselves, to be worked out by the Commission in the light of experience, according to the methods of private casualty insurance companies, as already was done with the existing groups.

Was actual inherent hazard ignored? Not at all; rather it was treated as virtually universal, but incapable of being precisely defined or classified by fixed statutory rules in advance, and more easily treated in the light of experience; the new group was to be a part of a law which oper-

ates, as nearly as experience may guide, not *in vacuo,* but only where there is actual inherent hazard and to the extent that it extends.

But why begin with "four workmen or operatives regularly employed?" Possible answer: It was necessary to begin somewhere; the legislature must decide where; it is reasonable to believe there is some actual inherent hazard, where even as few as four workmen or operatives are employed steadily, though it be no more than may arise from the danger of their injuring each other; besides, an employer who has as many as four workmen or operatives regularly employed, reasonably may be counted on to have a payroll account that may be made the basis upon which to compute the premiums for state insurance; below four, the business perhaps hardly would pay the cost of administration, hardly give opportunity to distribute the loss, according to the general principle of insurance which runs throughout the Compensation Law.

But why extend the responsibility of the employer to others in the same employ whose occupations are separate and non-hazardous? Possible answer: It is the employer himself who commingles in a single business or establishment those doing the more hazardous with those doing the less hazardous work, if it is done. If it be practicable to carry them on separate payrolls, presumably the Commission has the discretion to adjust it in fixing the amount of securities to be deposited under § 50, or the premium rate under § 95. Further possible answer: The difficulty is inherent in the subject; in years of practical experience, it had been found that in the extremely varied and complex organization of industry, disabling or fatal injuries occur when least expected, and in ways not characteristic of any particular industry described. The legislature hardly could be called upon to predict, any more than the employer, who was to be injured; and to confine the cost of casualty insurance strictly to those who were

sure to be "casualties", might baffle the efforts even of the experienced legislators who framed second group 45. Accidents cannot be relied upon to follow the symmetrical lines of group description; this is a difficulty that showed itself under the groups as they stood before, and led to the 1916 amendment of the definition of "employee". Even clerks and salesmen cannot, in this busy day, be confidently treated as immune from industrial hazards; if a general rule must be declared, it would be safer to say, on the basis of experience, that no occupation is free from industrial hazard, than to say that any specified occupation is free. Even the probable oversights or want of vision of the employer are an appreciable source of danger to clerks, as witness *Joyce* v. *Eastman Kodak Co.*, 182 App. Div. 354, where a clerk employed by a maker of photographic cameras and supplies (classed as hazardous in group 23) but engaged in clerical duties having no direct connection with the manufacture, was injured because of a defect of the chair in which she was sitting at work. A like suggestion arises in the case before us, where the employer insured the chauffeurs who drove the trucks with merchandise to the various stations, but failed to insure the salesmen, overlooking the fact that they also occasionally were subjected to peril in the line of duty. It may be objected that these cases are not typical; but the legislature may have realized, as an element of the problem with which they were dealing, what indeed is proverbial, that accidents do not conform to types; that they are one thing that happen "simply because"—they *are* accidents. The particular cases are not imaginary; they actually occurred, and were brought to the test of the Compensation Law. The legislature may have had the best of reasons for believing that others as strange were happening rather frequently in the great, busy, bustling population of the Empire State; that while an individual clerk's or salesman's life and limb perhaps were less in danger than an indi-

vidual machinist's, yet they were in appreciable danger; there were more clerks and salesmen than machinists; many times, naturally, they would be employed in the same business with machinists, or other "workmen or operatives"; any seeming incongruity or unfairness in grouping them together under the Compensation Law may be taken care of through the operation of the law itself, according to the tests of experience; second group 45 will cost nothing, in the large sense, beyond expenses of administration, if it should happen to reach where industrial hazard is non-existent; it will not be more burdensome than the industrial losses prove to be, where such hazards do exist.

And so we venture to suggest again, what has been hinted before, that *the common employer* may have been the mysterious link between the workmen in downtown Manhattan and the 125 scattered salesmen so far removed from the dangers of group labor. The legislature *may have* found it impracticable to charge industrial losses against the industry without seeking out him to whom it falls to pay other expenses; hence took the industries as they found them actually organized, holding each employer responsible as to all in his employ "in the same business or in or about the same establishment", etc., leaving the Industrial Commission to determine in particular cases whether the hazards are great or small, whether the employer should be required to deposit securities in advance, in what amount, what the premium rate ought to be, and all doubtful matters, according to experience; confident that an employer competent to conduct a business requiring "four or more workmen or operatives regularly" may be relied upon to make a profit above his payroll, insurance premiums, and other like expenses.

The State of New York, by constitutional amendment, has made this system due process of law for that State.

We are unable to say that in extending it by the addition of second group 45 the State has in the least degree exceeded the limitations imposed by the Fourteenth Amendment.

Judgment affirmed.

MR. JUSTICE McREYNOLDS, with whom concurred MR. JUSTICE McKENNA, dissenting.

The New York Workmen's Compensation Law provides:

"§ 2. Application. Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments: . . .

"Group 45. All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants."

By subdivision 4, § 3, "employee" is defined as—

"A person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants."

In *Europe* v. *Addison Amusements, Inc.*, 231 N. Y. 105, the Court of Appeals construed these provisions and some quotations from the opinion will show their far-reaching effect.

503. McREYNOLDS and McKENNA, JJ., dissenting.

"The legislature, in § 2, has classified certain employments as hazardous, and has given the right of compensation to employees engaged in such hazardous employments.

"By the amendment of subdivision 4, § 3 (Laws of 1916, c. 622, § 2), an employee, to be entitled to compensation, is no longer required to be himself engaged at the time of accident in hazardous work. It is sufficient that he is an employee in such hazardous business. *Matter of Dose* v. *Moehle Lithographic Co.*, 221 N. Y. 401.

"Group 45 as above quoted, was added by the Laws of 1918, c. 634, § 2. The legislature classified as hazardous employments all those occupations in which there were regularly engaged four or more workmen or operatives. It covered employments not specified in the other subdivisions. No doubt it was considered a risk to be in an employment where four or more manual laborers or operatives were engaged. It is not necessary for us finally to define or limit the words 'workmen' or 'operatives' as used in this subdivision. Generally speaking, a workman is a man employed in manual labor, whether skilled or unskilled, an artificer, mechanic or artisan, and an operative is a factory hand, one who operates machinery. Webster's New International Dictionary. There is a marked distinction between a workman and an employee. Although in a general sense all workmen and operatives are employees, yet all employees are not workmen or operatives, within the meaning of this law. The words 'workmen' and 'operatives' are used in their narrower meaning. *Bowne* v. *S. W. Bowne Co.*, 221 N. Y. 28.

"Europe, however, was an employee within the meaning of § 3, subd. 4, employed in a business or enterprise classified as hazardous, because it employed regularly four workmen or operatives. The evidence permitted the finding that the four men above named did manual work, consisting of moving scenery, arranging the stage, handling baggage, and cleaning and pressing clothes.

"Why the legislature should have extended by the second group of subdivision 45 the hazardous employments to any employment having four workmen or operatives is not for us to say. The courts, in construing statutes, are not concerned with the wisdom of the legislation. *Wilson* v. *C. Dorflinger & Sons*, 218 N. Y. 84, 86.

"We do not think, however, that the legislature has exceeded its powers of classification by this extension of hazardous employments. It may be, as above intimated, that a business not ordinarily hazardous becomes such at times when manual work is done or machinery operated in connection with its main purpose.

"Whether or not the legislature can extend the benefits of compensation to all employments irrespective of workmen's hazards we are not called upon, at this time, to decide."

Apparently former opinions of this court have upheld workmen's compensation acts against the claim that they destroy the right freely to contract and thereby deprive of property without due process of law upon the theory that the State may charge pecuniary losses arising from personal injuries against the industry, when men are employed in hazardous occupations for gain. If "hazardous occupations" is not a mere empty phrase, there must be real hazard—legislative declaration is not enough. And hazard is something more than the mere possibility of injury which is always present.

Opinions of the court below have so construed the challenged provisions that if a merchant while employing five hundred clerks in New York City, no one of them within the Workmen's Compensation Act, should employ four workmen to paint signs or nail up boxes at Buffalo, all his clerks would immediately come under the act. The occupation of a clerk stationed in New York City cannot be rendered hazardous simply because four workmen are employed at Buffalo. To argue that an occupation is

hazardous because some one engaged therein has received personal injuries is not helpful. Many have suffered fatal accidents while eating, but eating could hardly be called hazardous. If, as suggested by the court below, "it was considered a risk to be in an employment where four or more manual laborers or operatives were engaged" irrespective of anything else, then the assumption is contrary to common experience.

If the State has power to declare an employer liable whenever his employee is injured, irrespective of hazard, the discussions heretofore indulged which treated hazard as important were unfortunate and misleading. But if that element can be wholly disregarded, then consideration must be given to the classification adopted by the New York statute in its relation to the equal protection clause. As often declared, classification is permissible when rational. But what possible reason is there for imposing liability in favor of a hundred employees otherwise outside of the compensation statute simply because their employer has found it desirable to hire four men to do manual work in a shop or dig trenches miles away from the only place where the hundred serve?

Such cases as *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, and *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, are not pertinent. The classifications there approved rested upon the obvious truth "that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, and that assumed risk may be different in such establishments than in smaller ones," or upon some other distinction declared to be "sufficiently patent, simple and familiar."

In the present case it is said that the plaintiff in error may be put into a peculiar group and required to compensate Krinsky solely because he employed mechanics to hammer at a bench miles away from the station where

Krinsky sold papers, magazines, candy and chewing gum, and sometimes applied a little soap and water to his hands. I think both the due process and equal protection clauses of the Amendment forbid.